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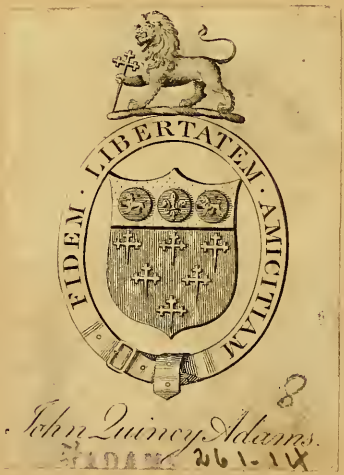

A

REPORT

OF DIVERS

CASES

IN

PLEAS OF THE CROWN,

ADJUDGED AND DETERMINED

IN THE REIGN OF THE LATE

KING CHARLES II.

WITH DIRECTIONS FOR

JUSTICES OF THE PEACE AND OTHERS.

COLLECTED

By SIR JOHN KELYNG, KNT.

LATE LORD CHIEF JUSTICE OF HIS MAJESTY'S COURT OF KING'S BENCH.

From the Original Manuscript under his own Hand.

TO WHICH IS ADDED,

The REPORT of three Modern CASES,

ARMSTRONG and LISLE —— The KING and PLUMMER —— The QUEEN and MAWGRIDGE.

As originally published

By LORD CHIEF JUSTICE HOLT.

WITH ADDITIONAL NOTES AND REFERENCES,

By G. J. BROWNE, BARRISTER at LAW.

DUBLIN:

PRINTED BY P. BYRNE, No. 108, GRAFTON-STREET.

M,DCC,LXXXIX.

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ADAMS
Vol. 14

ADVERTISEMENT.

MY Bookſeller ſome Time ago informed me of an Intention he had formed of publiſhing the Reports of Sir *John Kelyng*, which had for ſome Time paſt become ſcarce in this Kingdom, and requeſted my Reviſion of a New Edition of it.—Thoſe who have experienced his Civility and Attention, know that it is not eaſy to refuſe him a Requeſt, which does not materially interfere with their Pleaſure or their Intereſts.—*Kelyng* had very early, with me, been a favourite Law Writer; and in my firſt legal purſuits, I read it with all the Attention of which I was capable, and with all the Induſtry which I poſſeſſed.—If I had no Wiſhes for my Bookſeller, it would not, therefore, have been very hard to induce me to undertake that Office.—I conſented to become the Editor. In that Duty, which has been done to the beſt

of my Skill, I procured the two Editions which had been already publiſhed, and found them to be as they are deſcribed by Worral, in fact the ſame. The Edition of 1739, differing from that of 1708, only by having a new Title. I very ſoon diſcovered this, and it ſaved me the uſeleſs Labour of Collation: But I compared all the References with the Original Authorities, and have added ſome new References, not ſo much indeed to Modern Reports, as to the approved Syſtematic Writers of Crown Law, whoſe Works had not appeared when this Report was firſt publiſhed.

Of the Report itſelf, it may be ſufficient to ſay that it was publiſhed by Lord Chief Juſtice *Holt*, ſhortly after the Revolution, when the Crown Law became better underſtood, and had aſſumed that conſtitutional and ſyſtematic Arrangement which at preſent harmonizes and adorns it; and was diveſted of that anomalous and arbitrary Diſcretion, which before that Period had diſgraced it.—*Kelyng*'s Report may, therefore, be conſidered as one of the beſt Manuals of Crown Law.

In conſidering my Author, I here and there hazarded a Note; but the Notes have rather been borrowed from the Works of others, than from any Obſervation of my own.—In my referring

ring to the different Authorities of *Hawkins*, *Hale*, and *Foſter*, I have uſed the laſt Editions, I mean the ſixth Edition of *Hawkins*, by *Leach*; *Wilſon*'s Edition of *Hale*, and the ſecond Edition of *Foſter* by *Dodſon*: I chooſe to mention the particular Editions to which I refer, as in the paging of *Hawkins* there is a conſiderable Variation from any of the older Publications of that Work; and as there are many Inaccuracies corrected in the latter Editions of *Hale* and *Hawkins*.

"The dull Taſk of an Editor" has been often enough obſerved upon. However, as a profeſſional Man, I have experienced too much of the Utility of that kind of Labour in others, not to feel Gratitude.—If mine ſhall eaſe the Taſk of the Student, or more ſpeedily direct the Reſearch of the learned, I ſhall think a Vacation not thrown away, and be content with the humble Praiſe of Diligence, nor covet that of more ſplendid or faſtidious Ornament.

Chancery-lane, Dublin,
June 1ſt, 1789.

WE

WE do allow and approve of the Printing and Publiſhing the Reports and Caſes in Pleas of the Crown, collected by the late Lord Chief Juſtice *Kelyng*, and three other Modern Caſes added thereunto.

J. HOLT,
JOHN POWELL,
LITTLETON POWIS,
H. GOULD.

READER,

READER,

THERE can be nothing more ſaid to, recommend theſe Caſes to your Peruſal, than to aſſure you they are the Collection of Sir *John Kelyng*, Knt. ſometime Chief Juſtice of the Court of King's Bench; the Manuſcript whereof under his own Hand was in the Cuſtody of his Grandſon and Heir; Copies whereof were diſperſed in ſeveral Hands, which might hereafter be publiſhed to the Injury of the Author, and Diſadvantage of the Publick.—There are two *Quæres* inſerted in the Margin by the Publiſher, the one is in Page 13, the other in Page 41, which may be fit to be conſidered by the Learned.

The three Modern Caſes are conceived to be of ſome Uſe, therefore are thought fit to be publiſhed; and if they ſhall be found to be of any Benefit, its what is deſired by the Publiſher thereof.

FARWEL.*

* This Preface was written by Lord Chief Juſtice *Holt*.

ORDERS

AN

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TO THE RIGHT HONOURABLE

JOHN LORD BARON EARLSFORT,

CHIEF JUSTICE OF IRELAND.

MY LORD,

THE Reports of Sir JOHN KELYNG, at this Day require no Voucher. The Learning and acknowledged Ability of their original Editor, Sir JOHN HOLT, have ſufficiently introduced them to the Profeſſion. The ſame cannot be ſaid of theſe Reports in the hands of their preſent Editor, who is obliged to have recourſe to adventitious Recommendation— For that Purpoſe give me leave to intreat the Protection of your Lordſhip, to whoſe Court the Work has a particular Relation, and whoſe Attention, to even the humbleſt

Cultivators

Cultivators of the Law, has been evinced in the Condeſcenſion and Favour which I have ſo amply Experienced, and at the ſame time to aſſure your Lordſhip that I am, with the moſt thorough Senſe of Gratitude,

My Lord,

Your Lordſhip's

obliged, obedient

and very humble Servant,

Chancery-Lane,
June 6, 1789.

GEORGE JOSEPH BROWNE.

DIRECTIONS

FOR

JUSTICES of the PEACE.

ORDERS *and* DIRECTIONS *to be observed by the* Justices of the Peace, *and others, at the Sessions in the* Old Baily, *for* London *and* Middlesex, *made* 16 Car. 2. *by Sir* Robert Hyde, *Chief Justice of the King's Bench; Sir* Orlando Bridgeman, *Chief Justice of the Common Pleas; Sir* Thomas Twisden, *one of the Judges of the King's Bench; Sir* Thomas Tyril, *one of the Judges of the Common Pleas, and Sir* John Kelyng, *one other of the Judges of the King's Bench, and signed by them all, and Read in open Court, and ordered to be filed by the Clerk, that all Justices might take Copies by them if they please: For that they shall not for the Future pretend Ignorance of their Duty.*

1. THAT all Recognizances and Bailments taken by any Justice of the Peace, be certified into the Court the first Day of every Sessions before Noon, for that they being kept longer out, it often happens that 2 Hawk. 56.

Felons and other Offenders escape the Prosecutors, Witnesses, and Parties being wearied out with Delays and Attendance, beside many other great Mischiefs; and that the Justices of Peace who are faulty herein be fined by the Justices of Goal Delivery, according to the *Stat.* of 1 & 2 *Ph. & Ma. cap.* 13. and 2 & 3 *Ph. & Ma. cap.* 10.

2. If the Offenders appear not upon their Recognizances the first Day, the Default to be Recorded, and the Recognizance to be forfeited; Nevertheless Processes or Warrants, as the Case shall require, to go out against them and their Bail; so likewise as to those who are bound to give in Evidence, that if possible the Business be not deferred to another Sessions, in which time commonly the Prosecutors and Witnesses are taken off, and the Matters compounded.

3. That all Justices of the Peace do take Examinations both of the Felons without Oath, and the Informers and Witnesses against them upon Oath in Writing before they commit the Offenders to the Goal, and certifie the same the first Day of the Sessions, that they may be ready upon the Tryal of the Felons, or else to be fined according to the Statutes of *Ph. & Mary* before mentioned.

4. That all Prisoners for Treason and Felony be according to Law, sent to the common Goal, which is *Newgate*, and not to the *New-Prison*. It being found by Experience that they are often set at Liberty there without Tryal.

3. That

5. That no Prisoner for Felony be discharged during the Interval of Sessions, unless it be upon good Bail taken, the Warrant or Mittimus to the Goaler to keep them until they are delivered according to Law, nor any Bail or Recognizance for Appearance to be given up or withdrawn by the Justice of Peace after the Same is taken, but be returned and certified to the Sessions or Goal Delivery, the Offender whether Justice of Peace or Goaler to be severely proceeded against.

6. If any Justice of the Peace shall take Bail where he ought not, or wittingly or willingly take insufficient Bail, and the Party appear not, the said Justice not only to be proceeded against according to Law, but likewise to be complained of to the Lord Chancellor, that he may be turned out of his Commission.

7. That no Copies of any Indictment for Felony be given without special Order upon Motion made in open Court, at the general Goal Delivery upon Motion, for the late frequency of Actions against Prosecutors (which cannot be without Copies of the Indictments) deterreth People from Prosecuting for the King upon Just Occasions.

8. That the Goalers make more perfect Kalendars than of late they have done, according to the *Stat. H.* 7 *cap.* 3. and insert not only Persons in their Custody, but also such as have been in their Custody since the last Sessions, and Bailed or Delivered out, and by whom.

9. That if any *Habeas Corpus* come to receive a Priſoner from another Goal, the Goaler to take notice of the Offence for which he ſtood Committed at the other Goal, and to inform the Court, that if he ſhall happen to be acquitted, or have his Clergy, he may yet be remanded to the former Goal, if there be Cauſe.

10. If any *Habeas Corpus* come to the Goalers to remove a Priſoner, that with the Priſoner they alſo certifie the Cauſe for which he ſtood there committed. It being found by Experience, that by Colour of *Habeas Corpus* to receive and remove Priſoners, many notorious Offenders do Eſcape.

11. That no Priſoner convicted for any Felony, for which he cannot have his Clergy (unleſs it be Women, in ſuch Caſes, where if had they been Men, they might have had Clergy) be reprieved, but in open Seſſions, and not otherwiſe, without the King's expreſs Warrant, and not by order of any the Juſtices of Goal Delivery, or *Oyer* and *Terminer* *.

12. That ſuch Priſoners as are reprieved, with intent to be tranſported, be not ſent away as perpetual Slaves, but upon Indentures betwixt them and particular Maſters, to ſerve in our *Engliſh* Plantations for ſeven Years, and the three laſt Years thereof, to have Wages, that they may have a ſtock when their Time is expired; and that an Account be given thereof, and by whom they are ſent, and of their Arrivals †.

13. For

* As to the Nature of the Benefit of Clergy, or rather of the Statute at this Day, ſee 2 Hawk. Cap. 23. *per totum*, & 4 Black. Com. 338.

† For the modern rule, as to tranſportation, ſee 1 Hawk. p. 244. App. 13th, per tot. and 2 Hawk. Tit. Tranſportation, p. 514.

13. For that it hath frequently happened of late, that some have been killed upon Duels, others upon suddain Quarrels in the Streets. And the Inhabitants neglect to apprehend the Murderers, or to make Huy and Cry after them, and so the Persons not only escape, but no direct Knowledge can be given who they are. And by the Law, if any Man be slain in the Day, and the Fellon not taken, the Township ought to be amerced; that therefore when any such case appeareth at *Newgate*, as it too often doth, upon the acquittal of Persons apprehended upon Suspicion, that both the Coroner, as also the Secondaries at *Newgate* be required to attend the Judges of the King's Bench, that Information may be put in that Court against the Townships for the escape, and followed *pro Rege*; and at the next Sessions at *Newgate*, give an Account what is done.

Ro. Hyde,
Orl. Bridgeman,
Tho. Twisden,
Tho. Tyrell,
John Kelyng.

High-

High-Treason.

AFTER the happy Restauration of King *Charles* the Second to his Right of the Crown of *England*, which was in *May*, 1660, several Persons who were apprehended for the Murder of his Father, were now to be indicted for that horrid Treason, and in order thereto, the then Judges, who, at that Time were only the Lord *Bridgeman*, then Chief Baron of the Exchequer; Justice *Foster*, and Justice *Hide*, then Judges of the Common Pleas, and Justice *Mallet*, then Judge of the King's Bench, met several times, at *Serjeants-Inn* in *Fleet-street*, with Sir *Jeffry Palmer*, the King's Attorny, and Sir *Heneage Finch*, the King's Solicitur, Sir *Edward Turner*, Attorny to the Duke of *York*: Mr. *Wadham Windham*, of *Lincoln's Inn*, and myself, being by special Order to attend that service as Counsel for the King, there being then no King's Serjeant, but Serjeant *Glanvill*, Serjeant to the late King, who was then Old, and Infirm: And in order to the proceeding in that great Affair, I was appointed to make as many Queries as I thought fit to be advised upon; which, I did accordingly, and upon them, these Things following were resolved.

Resolutions of all the Judges upon the Case of the King's Murderers.

1. That it was better to try those Traitors at the Sessions at *Newgate*, by Commission of Goal Delivery, then only by special Commission of *Oyer* and *Terminer*: because then they might be proceeded against more speedily, and arraigned and tryed immediately, by the Commission of Goal Delivery, and Tales might be immediately returned at the Goal Delivery. And accordingly writs were ordered to be made and sent to the Lieutenant of the *Tower*, in whose Custody the Prisoners then were to deliver

2 Hawk. 572. Tryal at Goal Delivery, with a Commission of *Oyer* and *Terminer* joyned with it, better than a Tryal by a special Commission of *Oyer* and *Terminer*.

ver them to the Sheriffs of *London*, and Writs to the Sheriffs of *London* to receive them, that they might be in *Newgate*, which was done accordingly. And becauſe, by an Act of Parliament or Convention which ſat at the King's coming in Engliſh Proceedings were continued until *Michaelmas* now cloſe at hand, but not yet come; Therefore thoſe writs to the Lieutenant of the *Tower* and Sheriff of *London*, were ordered to be in *Engliſh* *.

2. It was agreed that all the Priſoners ſhould be arraigned the firſt Day before any of them were brought to Tryal, and the next Day to proceed to Tryal with one or more of them together, as ſhould be thought fit upon the place.

King's Council may privately give Evidence to the Grand Jury.

3. It was reſolved that any of the King's Council might privately manage the Evidence to the Grand Inqueſt, in order to the finding of the Bill of Indictment, and agreed that it ſhould be done privately; it being uſual in all Caſes, that the Proſecutors upon Indictments are admitted to manage the Evidence for finding the Bill; and the King's Council are the only Proſecutors in the King's Caſe, for he cannot proſecute in Perſon.

Compaſſing the King's Death in the Treaſon.
1 Hawk. 51.
1 H. P. C. 127.
Foſt. 194.
Prin P. L. 123.
3. Inſt. 12.

4. It was reſolved that the Indictments ſhould be for compaſſing the Death of the late King (the very compaſſing and imagining the King's Death, being the Treaſon within the *Stat.* 25 *Ed.* 3.) and then that we might lay as many Overt Acts as we would, to prove the compaſſing of his Death: But it was agreed, the actual Murder of the King ſhould be preciſely laid in the Indictment, with the ſpecial Circumſtances as it was done, and ſhould be made uſe of as one of the Overt Acts, to prove the compaſſing of his death.

Overt Act not laid in Indictment may be given in Evidence. This is altered by the Statute of 7 W. 3. c. 3. § 11.

5. It was reſolved that if any one Overt Act tending to the compaſſing the King's Death, be laid in the Indictment. That then any other Act which tends to the compaſſing

* All Law Proceedings are now in Engliſh by 4. Geo. 2. Cap. 26. 6 Geo. 2. Cap 14, in *England*; and by 11 Geo. 2. Cap. 6, in *Ireland*. See ſome Obſervations on this Alteration, in 3 Black. Com. 322.

the King's Death, may be given in Evidence together with that which is laid in the Indictment.

6. It was resolved that there need not be two Witnesses to prove every Overt Act, tending to the compassing of the King's Death. But one Witness to prove one Overt Act tending to the compassing the King's Death, and another Witness to prove another Act tending to the same end, are sufficient; for compassing the King's Death is Treason. And then if two several Witnesses prove two several Acts tending to the compassing the King's Death, the Treason is proved by two Witnesses as the Law in Case of Treason requireth. (9) Foſt. 237. 3 St. Tr. 204. Sir J. Raym. S. C. 2 Hawk. 366, 603. 2 H.P.C. 286.

7. It was resolved that if several Persons be indicted together in one Indictment for one Crime, in case some of them be found guilty by one Jury, and afterwards some of the same Jury be returned for Tryal of others in the same Indictment; it is no Challenge for those Prisoners to say, that those Jurors have already given their Verdict, and found others guilty who are indicted in the same Indictment for the same Offence; for though they are all indicted in the same Indictment for the same Offence, yet in the Law it is a several Indictment against every one of them, and the Crime is several, and one may be guilty and not another, and the Jury are to give their Verdict upon particular Evidence against every several Person, and therefore the finding one guilty, is no Argument or Presumption that those Jurors will find another guilty. Finding others guilty in the same Indictment, no cause of Challenge. 2 Hawk. 589. 4 St. Tr. 141, 175, 704.

8. It was resolved that if several Prisoners be put upon one Jury, and they challenge peremptorily, and sever in their Challenges, that then he who is challenged by one, is to be drawn against all, because the Pannel being joint, one Juror cannot be drawn against one and serve for another. But in such case it was agreed the Pannel might be severed, and that the same Jury may be returned betwixt the King and every one of the Prisoners, and then they are to be tryed severally, and there the Challenge of one Prisoner is no Challenge to disable the Juror so challenged against another Prisoner. And the case of Dr. *Ellis*'s Servant, *Plo. Com.* 100, 101, was agreed to be good Law, as to the severing of the Pannels in that case; and accordingly afterwards Severing of the Pannel. 2 Hawk. 573.

2 Star. Tr. 304, 9.

wards upon the tryal of *Harrison* and others, who challenged peremptorily, and severed in their challenges, particular Jurors, the Panels were severed.

(10)

Irons to be taken from Prisoners at their Tryal. Bracton 137. 3 Inst. 34, 35. Sum. 212. 2 Hale 219. 2 Hawk. 436, 7. 2 St. Tr. 381. 2 Hawk. 330.

9. It was resolved that when Prisoners come to the Bar to be tryed, their Irons ought to be taken off, so that they be not in any Torture while they make their defence, be their Crime never so great. And accordingly upon the Arraignment and Tryal of *Hewlet* and others, who were brought in Irons, the Court commanded their Irons to be taken off *.

Quidam ignotus.

10. It being agreed that the Murder of the King should be specially found, with the Circumstances in the Indictment. And it being not known who did that villainous Act; it was resolved, that it should be laid that *Quidam ignotus*, with a Visor on his Face did the Act; and that was well enough, and the other Persons be laid to be present, aiding and assisting thereunto.

No Year laid for one Act.

11. The compassing the King's Death, being agreed to be laid in the Indictment, to be 29 *Jan.* 24 *Car. Primi*, and the Murder on the 30*th* of the same *Jan.* It was questioned in which King's Reign the 30*th Jan.* should be laid to be, whether, in the Reign of King *Charles* the first, or King *Charles* the second, and the Question grew, because there is no Fraction of a Day, and all the Acts which tended to the King's Murder, until his Head was actually severed from his Body, were in the time of his own Reign, and after his Death in the Reign of King *Charles* the second. And though it was agreed by all, except Justice *Mallett*, that one and the same Day might in several respects, and as to several Acts, be said to be intirely in two Kings Reigns, so that in some respects the whole Day may be ascribed to one, and in other respects, the whole Day ascribed to the other, according to the Truth in the Matters of fact which were acted, either in the Life, or after the Death of the first King, yet because Justice *Mallett* was earnest that the whole Day was to be ascribed to King *Charles* the second, therefore it was agreed, that in that place, no Year of any King

* In *Layer's* Case, A. D. 1722. a Distinction was taken between the Time of Arraignment and the Time of Trial; and accordingly *Layer* stood at the Bar in Chains during the Time of his Arraignment. 4 Black. Com. 322. 6. St. Tr. 230.

King should be named, but that the compassing of the King's Death should be laid on the 29*th Jan.* 24 *Car.* and the other Acts tending to his Murder, and the Murder itself laid to be *Tricesimo Mensis ejusdem Januarii*, without naming any Year of any King, which was agreed to be certain enough.

2 Hawk. 333. Bur. 1901. S.P.

12. It being agreed that the Indictment should be for compassing the King's Death, and one of the Overt Acts to be the actual Murder of the King: It was resolved the Indictment should conclude *contra pacem nuper Domini Regis Coron' & dignitat' suas, Nec non contra pacem Domini Regis nunc Coron' & dignitat' suas.*

Contra pacem of two Kings.

13. The Question was put, whether the Recorder of *London* should give the Charge to the grand Inquest at *Hick's-Hall*, where the Indictment was to be found, the Fact being in *Middlesex*; And also whether Judgment at the Sessions-house, where the Prisoners were to be tryed, should be there given by the Recorder, or whether the Charge and the Judgment should be given by the Chief Judge: And it was agreed that both should be given by the Chief Judge. And accordingly this was done by my Lord *Bridgeman*, and he gave the Charge only relating to enquire of the Murderers of the late King, without mixing any other matter then to be enquired of: And after the Charge, one Indictment was preferred against all the King's Murderers, who were in Prison, and also against several others who were not then apprehended, but agreed they should be attainted by an Outlawry upon the same Indictment. And the same Day the Indictment was found, and the next Day delivered at the Goal delivery, in the Sessions-house in the *Old Bailey*, which Day all the Prisoners were arraigned, and pleaded not guilty, but afterward some of them withdrew their Plea, and confessed the Indictment, *viz.*

Chief Judge giveth Judgment in Treason.

The Day was *Tuesday*, 9th of *Octo.* 12 *Car.* 2d.

14. Sir *Hardres Waller*, and *Geo. Fleetwood*, which was accordingly recorded by the Court, and agreed by all the Judges, that it might be done, altho' the Clerk had recorded their Plea of not guilty; for the Entry is, that such a one *postea*, or *relicta verificatione cognovit Indictamentum.*

Confession after not guilty pleaded. 2 Hawk. 469. 2 St. Tr. 303.

(12)

Variance in Letters of Sirname. 2 St. Tr. 238. 2 Hawk. 328.

15. *Memorandum*, That upon the Arraignment of *Henry Martyn*, his Name being ſo written in the Indictment, he ſaid his Name was *Marten*, and not *Martyn*; but the Court agreed that he being known by that Name of *Martyn*, that was well enough in an Indictment, tho' it be not ſpelled directly as he ſpelleth it.

Memorandum, That the Indictment was in *Latin*, it being preferred after *Michaelmas*, until which time, all *Engliſh* Proceedings were allowed by that Convention which was ſitting when the King was reſtored.

And after, all the Priſoners who pleaded not guilty, were convicted upon full Evidence, and had Judgment of High-Treaſon.

Commiſſioners for Tryal, give evidence as Witneſſes. *Hacker's* Caſe. 2 St. Tr. 378. 2 Hawk. 608.

Memorandum, That Secretary *Morris* and Mr. *Anneſley*, Preſident of the Council, were both in Commiſſion for the Tryal of the Priſoners, and ſate upon the Bench, but there being occaſion to make uſe of their Teſtimony againſt *Hacker*, one of the Priſoners, they both came off from the Bench, and were ſworn, and gave Evidence, and did not go up to the Bench again during that Man's Tryal; and agreed by the Court they were good Witneſſes, tho' in Commiſſion, and might be made uſe of.

2 St. Tr. 337.

16. Upon the Tryal of *Coke* of *Greys-Inn*, who was of Council againſt the King, and delivered in the Charge againſt the King in the Traiterous Court called the High Court of Juſtice; he objected that he did not draw up the Charge; but he only acted as a Counſellor, and did only ſpeak Words to have the Charge read, and demanded Judgment againſt the King; and he ſaid Words did not make Treaſon.

Acting a Counſel, not excuſe for Treaſon. 2 St. Tr. 337.

17. It was reſolved by the Court, that if a Paper containing treaſonable matter, be indicted by another, yet being known by *Coke* to contain treaſonable matter, and being delivered by him as a Charge againſt the King to take away his Life, this is an Overt Act to prove that he compaſſed the King's Death, which is the Treaſon he is Indicted for.

Approbation in High-Treaſon maketh guilty. 1 H.P.C. 127.

18. And in the Caſe of High Treaſon, If any one do any thing by which he ſhewed his liking and Approbation to the Traiterous Deſign, this is in him High-Treaſon: For all are Principals in High Treaſon, who contribute towards it by Action or Approbation.

19. And

19. And it was reſolved that tho' in caſe a Man be indicted only for Words, that is not High-Treaſon. But if a Man be indicted for compaſſing the King's Death, there Words may be laid as an Overt Act to prove that he compaſſed the Death of the King, as it was in the Caſe of *Crohagan*, who being beyond Sea, ſpake theſe Words, *I will kill the King, if I can come at him;* and afterwards he came to *England*, and was taken and indicted for compaſſing the King's Death, and theſe Words laid as an Overt Act, and proved *, and he had Judgment of High-Treaſon. And *Co. Pl. Cor.* 14. agreeth, that Words ſet down in writing, are an Overt Act to prove the compaſſing the King's Death, as in the Caſe of Cardinal *Poole* there cited, and Words ſpoken are the ſame thing if they be proved; and Words are the natural way for a Man whereby to expreſs the Imagination of the Heart. If it be any way declared that a Man imagineth the King's Death, that is the Treaſon within the *Stat.* 25 *Edw.* 3. †

Words are an Overt Act to prove Treaſon. 1 Hawk. 57. & in notis. 1 H.P.C. 127. *Cro. Car.* p. 332. Foſt. 202. Though *Co. Pl. Cor.* 14. be againſt this Opinion, yet it was agreed that was no Law. Yet, *Quære*, becauſe of the different Opinions; but Words will explain the meaning of an Act.

20. *Memorandum*, That upon the Tryal of one *Axtell*, a Soldier, who commanded the Guards at the King's Tryal, and at his Murder; he juſtified that all he did was as

Acting as a Soldier by command of his Superiour, no excuſe for Treaſon.

* From this Caſe thus cited and the Rule that is grounded on it, a Reader would be induced to conclude that the *Words* were the *only* Overt Act laid in the Indictment; but that is not the Caſe, for beſides the Words, the Indictment further charged *that he came into England for the Purpoſe of killing the King*. Foſter's Crown Law, 203. 1 Hal. 116.

† Kelyng ſeeth no difference between Words *ſpoken and written*, which is this ſeditious *Writings* are permanent Things, and if publiſhed, they ſcatter the Poiſon far and wide, they are Acts of Deliberation capable of Proof, not liable to Miſconſtruction, but are naked and undiſguiſed as they came out of the Author's Hand: *Words* are tranſient, and fleeting as the Wind, the Poiſon they ſcatter, confined to a narrow Circle of a few Hearers, they are frequently the Effect of ſudden Paſſion, eaſily miſunderſtood and often miſrepreſented. Foſter's Crown Law, p. 204. And it has been laid down on more Occaſions than one ſince the Revolution, that looſe Words not relative to any Act or Deſign, are not Overt Acts of Treaſon. 4 St. Tr. 581, 645. 1 Black. Rep. 37. 1 Hawk. 58, in notis. Whether Words only ſpoken, can amount to an Overt Act of compaſſing the King's Death, is very well diſcuſſed in H. P. C. from 111 to 120, and 312 to 322; and in Foſter's C. L. 196 to 207; who both conclude againſt the above Aſſertion of Kelyng.—Hawkins, however, had doubts on the Subject. 1 Hawk. 60. & in notis.

That otherwise was indifferent. 2 St. Tr. 365 1 Hawk. 54. in notis.

as a Soldier, by the command of his superiour Officer, whom he must obey or die. It was resolved that was no excuse, for his Superiour was a Traitor, and all that joyned him in that *Act* were Traitors, and did by that approve the Treason; and where the command is Traiterous, there the Obedience to that Command is also Traiterous.

Backstead, Okey, and *Corbett*'s Case. 2 H. P. C. 40. Fost. 41. 1 Sid. 72. 1 Lev. 61. 1 Keb. 244. 1 Hawk. 3. in notis. Fost. 111. 8 S. T. 365.

Memorandum, That in *Easter Term*, 14 *Car.* 2*d*. *John Barksted*, *John Okey*, and *Miles Corbet*, three of those Persons who presumed to Judge the late King to Death were apprehended; they then being outlawed upon the former Indictment; and they were brought to the King's Bench Bar, and demanded severally what they could say why Execution should not be awarded against them (after the Indictment was first read to them) and they pleaded they were not the same Persons, and thereupon the same Day a Jury was presently returned, the Court sitting; and they found they were the same Persons, and so execution awarded, which was after done accordingly. *Note, So is the Report in the* Manuscript, *but the Record is of an Attainder by Act of Parliament; but there might be an Outlawry also.*

Execution awarded upon attainder by Outlawry.

Immediate Tryal upon Plea that the Prisoners were not the same Persons.

(14)

Sir *Hen. Vane*'s Case. 2 St. Tr 435. 1 Hawk. 51. 2 Hawk. 615.

Memorandum, That in *Trinity Term*, 14 *Car.* 2. Sir *Hen. Vane* was indicted at the King's Bench for compassing the Death of King *Charles* the 2*d*, and intending to change the Kingly Government of this Nation; and the Overt *Acts* which were laid, were, that he with divers others unknown Persons did meet and consult of the means to destroy the King and Government; and did take upon him the Government of the Forces of this Nation by Sea and Land, and appointed Colonels, Captains, and Officers, and the sooner to effect his wicked Design, did actually in the County of *Middlesex* raise War. And upon his Tryal, he justified that what he did was by the Authority of Parliament, and that the King was then out of Possession of the Kingdom; and the Parliament was the only Power regnant; and therefore, no Treason could be committed against the King: And he objected, that a levying War in *Surrey* could not be given in Evidence to a Jury in *Middlesex*; and he desired to offer a Bill of Exception, because these things were overruled by

The Acts laid were Acts done after the death of King *Ch.* the first, and before the actual restoring of King *Ch.* the second. 1 Hawk. 56.

by the Court; and in this Case these Points were resolved by the Court.

1. That by the Death of King *Charles* the *1st*, that long Parliament was actually determined; notwithstanding the *Acts of Parliament* that it should not be dissolved, but by the consent of both Houses. For every Parliament is called to consult with the Person of the King who calleth it; and therefore upon his Death it is determined; for they can no longer consult with him for which end they were called. And a Case was cited to be resolved, that, where, in the 13 of *Q. Eliz.* an *Act of Parliament* was made, that a Commission of *Sewers* should continue for Ten Years, unless the same be determined or repealed by any new Commission, or by *Superdeas*, *King James* granted such a Commission and died within that time; Adjudged, that the Commission was determined; for all Commissioners are determined by the Death of the *King* who grants them, and this point of the actual determination of that Parliament by the Death of *King Charles* the *1st*, was before that time resolved by all the Judges of *England*, as my Lord *Bridgeman* told me. *But note, there were no special Words to continue the Parliament upon the King's Death.*

Long Parliament dissolved by Death of the King. 1 Hawk. 53.

2. It was resolved, that tho' *King Charles* the *2d.* was *de facto* kept out of the exercise of the Kingly Office by Traitors and Rebels; yet he was *King* both *de facto* & *de Jure*. And all the *Acts* which were done to the keeping him out were High-Treason.

Traitors keep out the King, yet Traitors against him. 1 Hawk. 51. 53.

3. It was resolved that the very Consultation and Advising together of the means to destroy the *King* and his Government, was an Overt *Act* to prove the Compassing of the *King's* Death.

Consulting to destroy the King is an Overt Act to prove the Treason of compassing his Death.

4. It was resolved that in this Case, the Treason laid in the Indictment being the Compassing of the King's Death, which was in the County of *Middlesex*, and the levying War being laid only as one of the Overt *Acts* to prove the compassing of the King's Death, tho' this levying of War be laid in the Indictment to be in *Middlesex*, yet a War levied by him in *Surrey*, might be given in evidence; for being not laid as the Treason, but only as the Overt *Act* to prove the compassing, it is a transitory thing which may be proved in another Country. But if an Indictment be for levying War, and that made the Treason

for

for which the Party is indicted, in that Case it is local, and must be laid in the County where in truth it was.

No Bill of Exception in criminal Causes. 2 Hawk. 602. 1 Sid. 83. 1 Keb. 384. 1 Lev. 68. 2 Inst. 427.

5. It was resolved, that the *Stat. of W.* 2. *Cap.* 31. which giveth the Bill of Exception, extends only to civil Causes, and not to criminal; the Words of the *Stat.* are, *Cum aliquis implacitatur coram aliquibus Justiciariis, &c.* And the Intention never was to give such Persons liberty to put in Bills of Exception, for then there would be no Tryals of that Nature ever discharged in any time, neither here nor in the Circuits, if every frivolous Exception which a Prisoner would make, should be drawn up in a Bill of Exception; besides, the Court is always so far of Counsel with the Prisoner as to see that he hath right, and if they find any thing doubtful, they of themselves will take time to advise: But the Words of the *Stat.* are plain, as the Court agreed, as to this point.

(16)

Treason found by the Jury to be several Years before the time in the Indictment. 2 Hawk. 614.

6. Altho' the Treason of compassing the King's Death was laid in the Indictment to be the 30*th* of *May*, 11 *Car.* 2. yet upon the Evidence it appeared, that Sir *Hen. Vane*, the very Day the late *King* was murdered, did sit in Council for the ordering of the Forces of the Nation against the *King* that now is, and so continued on all along until a little before the *King*'s coming in. It was resolved that the Day laid in the Indictment is not material, and the Jury are not bound to find him guilty that Day, but may find the Treason to be as it was in truth either before or after the time laid in the Indictment; as it is resolved in *Syer*'s Case, *Co. Pl. Coron*' 230. And according in this Case the Jury found Sir *Hen. Vane* guilty of the Treason in the Indictment the 30*th* of *January*, 1 *Car.* 2. which was from the very Day the late *King* was murdered, and so all his forfeitures relate to that time to avoid all conveyances and settlements made by him *.

More than 24 may be returned for criminal Causes. 2 St. Tr. 435.

7. *Memorandum*, That in this Case of Sir *Hen. Vane*, he being to be tryed at the King's Bench Bar, before he came to his Tryal, it was considered by myself, and others then of the King's Council, that it was possible that he might challenge peremptorily, and so defeat his Tryal at that Day, at which it was appointed, if there should be only 24 Jurors returned.

And

* Confirmed by all the Judges to be Law. Lord Balmerino's Case. Fol. 9. 9 H. Tr. 588. 3 Inst. 230. 1 Hale 361. 2 Hale 179, 291.

And thereupon, search was made in the Crown Office, and it did appear, that in Tryals on the Crown side for Criminals, the Sheriff might be commanded to return any number the Court pleased; and accordingly, at his Tryal the Sheriff returned about 60 of the Jury; and at common Law in Civil Causes, it seems the Sheriff might have returned above 24 if he pleased; And therefore by the *Stat. W.* 2. *Cap.* 38. It is recited, that whereas the Sheriffs were used to summon an unreasonable multitude of Jurors to the grievance of the People; it is ordained that from thenceforth, in one Assize, no more shall be summoned than 24, which *Stat.* extends not to Jurors, returned for tryal of criminal Persons; the like may be done upon a Commission of *Oyer* and *Terminer*.

For before that Stat. of W. 2. Cap. 38 more than 24 might be returned in civil Causes which is outed by that Stat. five in great Assize, and that Stat. does not extend to criminal Causes or Indictments for the King.

Memorandum, That at the Sessions at *Newgate*, 11. *Dec.* 14 *Car.* 2. *Tho. Thong*, *Geo. Philips*, *Francis Stubbs*, and several others, were indicted for High-Treason, for compassing the King's Death, and the Overt Acts laid in the Indictment, were assembling themselves together, and consulting and agreeing to destroy the King. *Ac ad eas-dem proditiones perimplendas*, the consulting to seize *Whitehall*, where the King was Resident.

(17)
Tong's Case. 2 St. Tr. 478. 1. Hawk. 51. in notis 119.

1. And in this case, It was resolved by all the Judges, that the meeting together of Persons, and consulting to destroy the King, was of itself an Overt Act to prove the compassing the King's Death.

Consulting is an Overt Act. 1 Hawk. 56. Post. 195.

2. It was resolved that where a Person knowing of the Design does meet with them, and hear them discourse of their traiterous Designs, and say or act nothing; This is High-Treason in that Party, for it is more than a bare Concealment, which is *Misprision*, because it sheweth his liking, and approving of their Design; but if a Person not knowing of their Design before, come into their Company, and hear their Discourses, and say nothing, and never meet with them again at their Consultations, that Concealment is only Misprision of High-Treason. But if he after meet with them again, and hear of their Consultations, and then conceal it, this is High-Treason. For it sheweth a liking, and an approving of their Design; and so was Sir *Everard Digby*'s Case, who in the Powder Treason met with the Traitors, and heard their Design, but upon the Evidence it was not proved that he

Concealment where it is High-Treason, and where but Misprision. 1 Hawk. 51. in notis. Post 20. 1 Hawk. 86.

1 St. Tr. 224.

said any Thing, or acted any Thing, and he had Judgment of High-Treason.

Persons in the same Treason, good Witnesses. 2 Hawk. 608, 9. *But see Note to Hawk: on that Passage.* 1 H.P.C. 303, 4.

3. It was resolved that some of those Persons who are equally culpable with the rest, may be made use of as Witnesses against their Fellows, and they are lawful Accusers, or lawful Witnesses within the *Stat.* 1 *Ed.* 6. 12. 5 & 6 *Ed* 6. *Cap.* 11. & 1 *Mar.* 1. and accordingly, at the Tryal of these men, some of their Partners in the Treason were made use of against the rest; for lawful Witnesses within those Statutes are such as the Law alloweth; and the Law alloweth every one to be a Witness who is not convicted, or made infamous for some Crime. And if it were not so, all Treasons would be safe; and it would be impossible for one who conspires with never so many others to make a discovery to any purpose.

But the *L. C.* Baron *Hales* said, that if one of these culpable Persons be promised his Pardon, on Condition to give Evidence against the rest, that disableth him to be a Witness against the others, because he is bribed by saving his Life to be a Witness, so that he takes a difference where the Promise of Pardon is to him for disclosing the Treason, and where it is for giving of Evidence *. But some of the other Judges did not think the promise of Pardon, if he gave Evidence, did disable him, but they all advised that no such promise should be made, or any threatnings used to them in case they did not give full Evidence.

Diversity of Opinions. 2 Hawk. 611.

There needs 2 Witnesses for a Treason, at this Day, Stat. 1 & 2 P & M. Cap 10. See afterwards in this Book, fo. 49. more of this Point. Same Witnesses to find the Indictment, and at Tryal.

4. Altho' the Lord Chief Justice *Bridgeman*, and some others of the Judges were of Opinion that those Words of two Witnesses in case of High-Treason, were repealed by the *Stat.* & 2 *Ph.* & *M. Cap.* 10. which enacts that all Tryals for Treason be according to the Course of the Common Law: And at Common Law, one Witness is sufficient to a Jury, tho' *Co. Pl. Cor.* is against this Opinion, yet they all agreed that if that Law for two Witnesses be in force, yet the same two Witnesses who are to the Indictment, may be also the Witnesses at the Tryal: And the Law doth not require two to the finding the Indictment, and two others at the Tryal.

5. They

* The Judges who dissented were Lord Hale and Mr. J. Brown; and Lord Hale is of the same Opinion in 2 H. P. C. 280: But the Opinion of the Majority of the Judges has been ruled to be Law, in Layer's Case. 6 St. Tr. 259, as well as in the present Case; yet for the Reasons in 1 H. P. C. 304. it is a great Objection to the Credibility if not to the Competence of the Witness.

5. They all agreed that if a Conſpirator be examined before a Privy Councellor or a Juſtice of Peace, and upon his Examination without Torture confeſs the Treaſon; If after at his Tryal he deny it, and two Witneſſes to prove that Confeſſion, are good Evidence againſt him that made that Confeſſion, at his Examination aforeſaid; and in that caſe there needs no Witneſſes to prove him guilty of the Treaſon; for that Confeſſion puts it out of the Statute which requires two Witneſſes to prove the Treaſon, unleſs the Party ſhall without Torture confeſs the ſame; and the Confeſſion there ſpoken of, is not meant a Confeſſion before the Judges at his Tryal, but a Confeſſion upon his Examination: But ſuch Confeſſion ſo proved is only Evidence againſt the Party himſelf who made the Confeſſion, but cannot be made uſe of as Evidence againſt any others whom on his Examination be confeſſed to be in the Treaſon.

Confeſſion upon Examination proved by two Witneſſes good Evidence of itſelf.
2 Hawk. 365, 604.
2 H.P.C. 256.
Foſt. 240.

6. They all agreed that ſuch a Confeſſion upon Examination before a Privy Councellor, tho' he be not a Juſtice of Peace, is a Confeſſion within the meaning of the Statute; and the rather Lord *Bridgeman* ſaid, becauſe Juſtices of the Peace were not enabled to take Examination before the *Stat.* 1 & 2 *P.* & *M. Cap.* 13.

Confeſſion before a Privy Councellor, is a Confeſſion within the Stat.

Memorandum, That a Week before *Chriſtmas*, 15 *Car.* 2. my Brother *Turner*, myſelf, and my Brother *Archer*, were appointed by the King to go to *York*, for the Tryal of ſeveral Perſons there taken for conſpiring to levy War againſt the King, and ſome of them did actually meet in *Farmeleigh-wood* near unto *Leeds*, with Horſes, Arms, and Foot Soldiers. And thereupon there was a meeting by the two Chief Juſtices, my Lord *Hyde*, and my Lord *Bridgeman*; and we three with Sir *Jeff. Palmer* the King's Attorney, and Sir *Heneage Finch* the King's Solicitor, did thereupon debate ſeveral Things which were agreed by us all, *viz.*

The North riſing *Car* 15. 2.

1. That if ſeveral Perſons do agree to levy War, and ſome of them do actually appear in Arms, and others do not, this is an actual levying of War in all of them, as well thoſe who were not in Arms, as thoſe who were, if they be proved to be of the Plot with them who did actually appear in Arms; for there are no Acceſſaries in Treaſon, and therefore all that are in the Conſpiracy are equally guilty.

Several Perſons agree to raiſe War, and ſome appear actually in Arms.
1 H.P.C. 133.
3 Inſt. 9, 10.

1 Hawk. 55.

In the next place, we being informed that tho' there was a Conspiracy to raise War in the *North Riding* of *Yorkshire*, as well as the *West Riding* where some did actually appear in Arms, yet it could not be proved that those in the *North Riding* did agree to the rising that was in the *West Riding*, or that they knew any thing of it, and so would not be within the first Resolution.

New Statute for Safety of the King's Person.

(20)

And thereupon the new Statute made the 13 *Car.* 2. for the safety of the King's Person, which maketh the Conspiracy compassing and intending to raise War to be High-Treason, in case they express or declare such Imaginations, Intentions, &c. by Printing, Writing, Preaching, or malicious, and advised speaking; and upon that Act it was agreed,

This Act expired on the Death of [illegible] 2. Foſt. 223. *A similar Act had passed in* 13 *Eliz. and expired at* [illegible] *Death.* 1 Hawk. 50, 51, in notis 55, 56. Foſt. 220.

2. That if one be indicted for imagining or intending to levy War, there must be some Overt Act laid in the Indictment to prove such Imagination, as there is at this Day in Indictments for compassing and imagining the King's Death; and it was conceived that no Overt Act could be laid to make it Treason within that Statute, but one of those which are named in that Statute, *viz.* Printing, Writing, Preaching, or Malitious, and advised speaking, and we were informed that no Printing, Writing, or Preaching could be proved, and it would be impossible to lay such Words as could be fastened on them, and to prove that they spoke them; but in general we were informed, that their consulting and meeting together, and agreeing to raise War would be proved; and thereupon it was resolved that the best and safest way to proceed against them, was to indict them for compassing and imagining the Death of the King, and to lay the meeting, consulting, and agreeing to levy War, as one Overt Act, and the actual levying War as another Overt Act, and so proceed upon the *Stat.* 25 *Ed.* 3.

Consulting to levy War, is an Overt Act to prove compassing the King's Death. 2 St. Tr. 474. 2 St. Tr. 435.

3. For it was resolved, and agreed by all now as it was before it was in *Tong*'s Case, and Sir *H. Vane*'s Case, that the meeting and consulting to levy War is an Overt Act to prove the compassing the King's Death within the *Stat. of Ed.* 3. Altho' the consulting to levy War is not actual levying within the Statute, and so cannot be indicted thereupon, for that Treason of levying War. Yet if they be indicted for the Treason of compassing and imagining the King's Death, that consulting to levy War is

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an Overt Act to prove that Treason, altho' *Co. Pl. Cor.* 14. delivers an Opinion against this.

4. It was resolved, that if Persons do actually levy War, so that they may be indicted for the Treason of levying of War, within the *Stat.* 25 *Ed.* 3. Yet they may be indicted for compassing the King's Death, and their actual levying of War may be laid as an Overt Act to prove the compassing the King's Death: And tho' *Co. Pl. Cor.* 14. be of another Opinion, yet that is no Law: For he expressly contradicts himself, for he reports the Case of the Lord *Copham*, 1 *Jacobi* 1.

(21)

Actual War an Overt Act to prove the compassing the King's Death. Dyer 308. Pl. 73.

And the Case of the Earl of *Essex*, 43 *Eliz.* where it was resolved by all the Judges, That the gathering of Men together to compel the King to yield to certain Demands, or to remove ill Councellors, was an Overt Act to prove the compassing of the King's Death, for which they were indicted, so *Co. Pl. Cor.* 12. accords, and in the same Book, *Fo.* 14, *&c.* agreeth, That if a Subject conspire with a Foreign Prince beyond Seas to invade the Realm, and prepare for the same by some Overt Act, this is a sufficient Overt Act to prove him guilty of Treason in compassing the King's Death. And it was observed that in these Posthumous Works of Sir *E. Coke*, of the Pleas of the Crown, and Jurisdiction of Courts, many great Errors were published, and in particular in his discourse of Treason, and in the Treatise of Parliaments.

1 St. Tr. 307.

Errors in *Co. Pl. cor'* Jurisdiction of Courts, of Treason, and of Parliaments.

5. It was agreed that the bare knowledge of Treason, and the concealment of it was not High-Treason, but Misprision of Treason. But in Case any thing be proved upon Evidence, that the Party liked or approved of it, then it is High-Treason; or if the Party knew of the Design, and after such Knowledge, met with the Conspirators at their Consultation; or if he went knowingly to their Consultations several Times, this is Evidence of his Approbation of the Design, and is High-Treason.

Misprision of Treason; what, and what not. Ante 17. 1 Hawk. 86. 4 Black. Com. 120.

6. It was agreed that to make a Misprision of Treason, there must be a Knowledge of the Design, and of the Persons, or some of them; for a Man cannot be said to conceal what he doth not know; and therefore, if one tell

What requisite to make Misprision of Treason.

Hawk. 87. tell *I. S.* in general, that there will be a rising without acquainting him with the Persons who are to rise, or with the Nature of the Plot, If *I. S.* conceal this, this is no Misprision of Treason, because he hath no Knowledge of the Treason.

Misprision what is a discovery, and what not. 1 Hawk. 87.

7. It was agreed that if one knew of a Treason, and knew some of the Conspirators, and then tell other Men in general Terms that there will be a rising, *&c.* without a discovery of the Plot, or the Traitors, such a Discourse will not acquit him from Misprision of Treason by concealment of it, because notwithstanding those general Discourses, both the Treason and the Traitors are concealed by him.

What shall be a discovery of Treason.

8. And in case such a Person who knoweth of a Treason, and the Traitors, and discovers all he knoweth to another Person who is not a Privy Councellor, or a Justice of Peace, or hath Authority to take Examinations concerning it, it was doubted whether such a discovery would acquit him from concealing of Treason which is Misprision.

Twyn's Case. 2 St. T. 528. 3 St. 380. 1 Hawk. 51, 56. Printing Treasonable Positions, an Overt Act to make good an Indictment, for compassing the King's Death.

At the Sessions in the *Old Bailey*, 20 *Feb.* 15 *Car.* 2. *John Twyn* was indicted on the *Stat.* 25 *Ed.* 3. of High-Treason, for compassing and imagining the King's Death, and the Overt Act laid in the Indictment was, the Printing of a Seditious, Poisonous and Scandalous Book, entituled, *A Treatise of the Execution of Justice, wherein is clearly proved that the Execution of Judgment and Justice is as well the Peoples as the Magistrates Duty, and if the Magistrates pervert Judgment, the People are bound by the Law of God to execute Judgment without them.* And besides that Title of the Book, several Passages in the Book were set forth in the Indictment, which in substance were, first, That the supreme Magistrate is accountable to the People. 2. The People are incited to take the Management of the Government into their own Hands. 3. The People are encouraged to take up Arms against the King and his Family. 4. They are stirred up to revolt, as an Action honourable and conscientious, and Encouragements

ments given to any Town, City or County in the three Kingdoms to begin the Work. 5. The People are exhorted, not only to caſt off their Allegiance, but to put the King to Death. And upon the Evidence it was proved, that *Twyn* being a Printer, by himſelf and Servants printed this Book; That he corrected ſome of the Sheets, and that he ſcattered many of them to be ſold; and he was found guilty, and had Judgment for High-Treaſon, and was accordingly executed.

At this Tryal were preſent of the Judges the Chief Juſtice *Hyde*, and myſelf, and alſo my Brother *Wylde* Recorder of *London*, and reſolved by all clearly, That Printing and Publiſhing ſuch wicked Poſitions, was an Overt Act declaring the Treaſon of compaſſing and imagining the King's Death, which was alſo agreed by the Reſt of the Judges upon our Diſcourſe with them. At the ſame Seſſions *Simon Dover*, *Tho. Brewſter*, and *Nathan Brookes*, Printers and Bookſellers, were indicted at the Common Law, as for a great Miſdemeanour for printing and publiſhing one Book, called, *The Speeches and Prayers of Harriſon, Cook, Hugh Peters*, and others condemned for the Murder of the late King, in which were many deſperate Paſſages, juſtifying their Villainy; and another Book called, *The Phœnix, or Solemn League and Covenant*; In which alſo were Paſſages of dangerous Conſequence. And they being found guilty, it was reſolved, That tho' Printing be a Trade, and ſelling of Books alſo, yet they muſt uſe their Trade according to Law, and not abuſe it, by printing or ſelling of Books ſcandalous to the Government, or tending to Sedition. So in caſe of a Councellor at Law, he may plead his Clyent's Cauſe againſt the King; but if, under Colour of that, he takes upon him to vent Sedition, he is to be puniſhed.

Brewſter and *Brooke*'s Caſe. 2 St. Tr. 528, 538, 545.

Memorandum. Cooke's Caſe, a Lawyer in *Gray's-Inn*, who managed that villainous Charge againſt the late King at his Tryal, would have excuſed himſelf, becauſe he acted only as Counſel; but that would not ſerve his turn; he was executed with the Reſt. And in this principal Caſe the Perſons were told, that the King had dealt

Judgment. 2 St. Tr. 337.

Mercifully

Mercifully with them, that he did not proceed againſt them capitally, and they were all fined, *viz. Brewſter* 100 Marks, and *Dover* and *Brookes* 40 Marks apiece, and every of them to ſtand in the *Pillory*, one Day at the *Exchange*, from Eleven to One, and another Day in *Smithfield*, for the ſame Time, with Papers on their Hats, declaring their Offence for printing and publiſhing ſcandalous, treaſonable, and factious Books againſt the King and Government, and to lie in Goal without Bail till the next Goal Delivery, and then to make an open Confeſſion and Acknowledgment of their Offences in ſuch Words as ſhould then be Directed; and afterwards to remain in Priſon during the King's Pleaſure, and not to be diſcharged before every one of them put in good Sureties by Recognizance, themſelves in 400*l.* apiece, and two Sureties for each of them in 200*l.* apiece, not to Print or Publiſh any Books but ſuch as ſhall be allowed by Authority.

Judgment againſt *Brewſter* and others.

Newgate Seſſions, 14 *October*, 14 *Car.* 2.

Raven's Caſe. 1 Hawk. 134, 137.

Mary Raven, alias Aſton, was indicted for ſtealing two Blankets, three pair of Sheets, three Pillowbiers, and other Goods of *William Cannon*. And upon the Evidence it appeared, that ſhe had hired Lodgings and Furniture with them for three Months, and during that Time, conveyed away the Goods which ſhe had hired with her Lodgings, and ſhe herſelf ran away at the ſame Time *. And it was agreed by my Lord *Bridgeman*, myſelf, and my Brother *Wylde*, Recorder of *London*, then preſent, that this was no Felony, becauſe ſhe had a ſpecial Property in them by her Contract, and ſo there could be no Treſpaſs; and there can be no Felony where there is no Treſpaſs, as it was reſolved in the Caſe of *Holmes*, who ſet fire on his own Houſe in *London*, which was quenched before it went further. *Vide* the End of this Book, *Kelyng contra* 81.

Co. Pl. Cor. 107, 108. 1 Hawk. 546, 7.

2 Hawk. 546, 7.

At the ſame Seſſions one was indicted for Murder, and upon his Tryal was found guilty of Manſlaughter, and then offered to plead the King's Pardon, which upon ſight of it *pardon' feloniam & felonicam interfeccon'* of the Man ſlain, *Non obſtant'* the *Stat.* of 10 *E.* 3. & 13 *R.* 2. which was

* Altered by Stat. 3, 4. W. & M. 2, 9. Vide Poſtea 81. Denied to be Law, and found Felony.

was agreed by us all to be a Pardon of Murder, notwithstanding the Proceedings in *Rickabee's* Case by *Rolls* during the late Troubles, and then the Question was, if now the Party had not lost the Benefit of his Pardon; for he that pleads a Pardon confesseth the Fact, and relyeth upon the King's Mercy: And therefore, if after his Pardon, he plead not guilty, he waved his Pardon, which is clear Law *. But here the Question was, because this Pardon here by the express Words pardons Man-slaughter only, and then by reason of the *non obstant* it extends to pardon Murder, whether tho' he waved it as to Murder, he might not make use of it as to Man-slaughter. And as to that, there being some difference in Opinion, the Party was bailed, and had a Certificate from us of the Nature of the Case, and thereupon obtained a new Pardon. But it was agreed by us all, if the Pardon had not extended to pardon Murder, he could not possibly make use of it. And therefore, upon this Tryal, he was only found guilty of Man-slaughter, he might plead that Pardon, and it should have been allowed: And after, when he came to plead his new Pardon, and that was allowed, he paid Gloves to the Judges, which is a due Fee for that, *Vide* 4 *E.* 4. 10 *B. Pulton de pace* 88. *a.*

March 213. Styles 369. 2 Hawk. 549, 42, 3. Wilson 150. Hale 252. S. P. C. 173, 169. B. Cor. 200.

Gloves due to Judges on allowance of Pardons. 2 Hawk. 562.

Memorandum, In the aforesaid Case it was moved, that the Court should not absolutely discharge the Person, but ought to commit him or bail him, until the Year and a Day after the Fact committed, by the Statute of 3 *H.* 7. *C.* 1. But upon sight of that Statute it appeared that that Statute extends only where Persons are indicted for Murder, and are acquitted, there they are to be committed or bailed till the Year and a Day past, that if any one will bring an Appeal, he may be forth-coming: But extends not to Persons who being indicted for Murder are found guilty of Man-slaughter, or *se defendendo*, or by mischance.

Stat. 3 H. 7. for committing or bailing extends only to such as are acquitted for Murder, and to such as are found guilty of Man-slaughter.

At the same Sessions, one *John Roberts* was indicted as a Principal in a Burglary, and upon the Evidence it appeared, that he was only accessary after the Fact, by

One acquitted of the principal Fact cannot after be arraigned as Accessary before the Fact, but he may be arraigned again as Accessary after the Fact.

* But see the King and Haines Wils. 214. where the Benefit of an Act of Grace was allowed after the general Issue pleaded.

receiving thoſe who did it, and the Goods, and thereupon it was doubted, that if the Jury ſhould acquit him, as they muſt upon this Indictment, whether he might afterwards be indicted as Acceſſary. And therefore to avoid all doubt, the Court diſcharged the Jury of him, and ordered another Indictment to be againſt him as Acceſſary. But afterwards, upon Conſideration of the Books, we did agree, that the Law was, If one was indicted as Principal and acquitted, he cannot after be indicted as Acceſſary before the Fact: But notwithſtanding ſuch Acquittal, he may be indicted as acceſſary after the Fact, and the Reaſon is, becauſe he that commands or adviſes a Robbery, Burglary, or Murder to be committed is *quodam modo* guilty of the Fact; And therefore if he be found not guilty of the Fact, being indicted as Principal, he cannot afterwards be tried as Acceſſary before the Fact, becauſe by the former Verdict, he is found not to be guilty of the Fact, which extends to all guilt before the principal Fact committed. But an Acceſſary after is not guilty in any ſort of committing the Fact, for it was done before he knew any thing of it; therefore if he be tried as Principal, and found not guilty, he may be after indicted as Acceſſary after; for that is an Offence ſubſequent to the committing of the Fact, and is for receiving the Felons, or after the Fact done, which is an Offence of another Nature: So are the Books, 27 *Aſſ. Pl.* 10. 8 *H.* 5, 6, 7. And ſo have the Preſidents upon Examination always been at *Newgate* Seſſions.

Acceſſary before or after, Diverſity as to acquital on Indictment as Principal. 2 Hawk. 529. S.P.C.44,105. Sum.224,244. 1 Hale 626. Foſter 362. Poſt.30,47,52. Foſt. 30, contra. See the Caſe of *Samuel Atkyns*. 2 St. Tr. 788.

At the ſame Seſſions, *Edward Rew* was indicted for killing *Nathaniel Rew* his Brother, and upon the Evidence, it was reſolved, that if one gives Wounds to another, who neglects the Cure of them, or is diſorderly, and doth not keep that Rule which a Perſon wounded ſhould do; yet if he die it is Murder or Manſlaughter, according as the Caſe is in the Perſon who gave the Wounds, becauſe if the Wounds had not been, the Man had not died; and therefore neglect or diſorder in the Perſon who received the Wounds, ſhall not excuſe the Perſon who gave them.

Rew's Caſe. Diſorder or neglect, not excuſe the Perſon who gave the Wounds. 1 Hawk. 119.

At

At the ſame Seſſions, *Thomas Middleton*, Tooth-drawer on *Ludgate-hill*, was indicted for marrying two Wives, and upon his Tryal, he produced a Sentence of Divorce from his firſt Wife under Seal *Cauſa Adulterij*, of her Part, and agreed that he was not within that Statute, for *Rooke*'s Caſe was ſtronger, which ſee, 1 *Cro.* 461. where the Divorce was *cauſa ſevitiæ*, and that adjudged to excuſe from the Statute.

Middleton's Caſe. Two Wives and Party Divorced *cauſa Adulterij* not within Stat. 21 *Jacob.* *Sed Vide* Ducheſs of *Kingſton*'s

Caſe. 11 St. Tr. 198. 1 Hawk. 174. 1 H. P. C. 694.

At the ſame Seſſions, one *Henry Burgeſs* was indicted for breaking up a Chamber in *Somerſet-houſe*, and the Indictment laid it to be *dom' Manconal'* of the Perſon who lodged in it. And it was agreed, that the Indictment was not good, becauſe all *Somerſet-houſe* is one intire Houſe of the *Queen-mother*, and all who Lodge in it are her Servants; and therefore it ought to be *dom' Manconal'* of the *Queen-mother*. So for *White-hall*, which is the King's Houſe; and it differs from the Caſe of an Inns of Court, where every Gentleman hath a ſeveral Intereſt, and therefore there every ſeveral Chamber is *domus Manconal'* of the Perſon who hath the Intereſt.

Burgeſs's Caſe. Chamber in *Sommerſet-houſe*, not the Manſion-Houſe of him who abideth in it; otherwiſe of a Chamber in Inns of Court. 1 Hawk. 162. 2 Hawk. 500. See Foſt. 39. 1 H.P.C. 522.

557. 2 Hawk. 499. Sum. 237, 8. *Lee v. Ganſel* *Cowper* 1. 2 Salk. 532.

At the ſame Seſſions, one *John Legg*, being indicted for the Murder of Mr. *Robert Wiſe*. It was upon the Evidence agreed, that if one Man kill another, and no ſudden Quarrel appeareth, this is Muder, as *Co.* 9. *Rep.* *fol.* 67. *b. Makelly*'s Caſe. And it lyeth upon the Party indicted to prove the ſuddain Quarrel.

Legg's Caſe. Murder to kill one without Cauſe, the ſuddain Quarrel lyeth in the Priſoner to prove. 1 Hawk. 124.

And in this Caſe it was alſo agreed, that if two Men fall out in the Morning, and meet and Fight in the Afternoon, and one of them is ſlain, this is Murder, for there was time to allay the Heat, and their after-meeting is of Malice.

Quarrel in Morning, Fight in Afternoon, Murder.

1 Hawk. 122, 123. Foſt. 27.

At the ſame Seſſions, *George Thorley*, being indicted for Robbery, refuſed to plead, and his two Thumbs were tyed together with Whipcord, that the Pain of that might compel him to plead, and he was ſent away ſo tyed, and a Miniſter perſwaded to go to him to perſwade him; And an Hour after he was brought again and

Thorely's Caſe. One ſtand Mute, Thumbs tyed together with Whipcord. 2 H.P.C. 319.

2 Hawk. 467. pleaded. And this was said to be the constant Practice at *Newgate* *.

What Circumstances inquirable where one kills another in keeping the Peace, or where a Parent or Master kills a Child or Servant in chastizing.
1 Hawk. 105. 2 Roll. 120. Sum. 38.

Note, That although if an Officer or other Person kill another in preserving the Peace, or a Parent, Master, or Schoolmaster kills his Child, Servant or Scholar in chastizing or correcting him, this shall be said to be *per Infortunium*, yet *Vide Stat.* 1 *Jac. C.* 8. for stabbing, there at the End of it, there is a *proviso*, that the Statute shall not extend to any Person who shall kill in keeping and preserving the Peace, so as the Man-slaughter be not committed wilfully and of purpose, under pretext of keeping the Peace; nor to a Master or Parent in chastizing his Child or Servant, besides his or their Intent or Purpose, so that those Circumstances are inquirable in those Cases.

Clergy, the Court Judge of reading, not the Ordinary.
2 Hawk. 305, 506.

Vide 9 *E.* 4. 28. One demands his Clergy, and the Court took the Book and turned him to a Verse, and he could not read well, but read one Word in one Place and another Word in another Place. And the Judges asked the *Ordinary* if he would have him; and he answered yea. The Judges bid him consider, and told him the Court was Judge of his reading, and if the Court should Judge he did not read, the *Ordinary* should be fined, and the Prisoner hanged, notwithstanding his demanding of him, and he was hanged, *Vide Fitz Abridgment, titulo Corone* 32. And *Vide* at the End of the Case in the Book at Large, *viz.* 9 *E.* 4. 286. several Books are cited where in the Absence of the *Ordinary*, the Court delivered the Book to the Prisoner, *Vid* the same Book.

In the Absence of the Ordinary the Court may deliver the Book *F.N.B.* 66, *h.* accordingly the Court delivered the Book in absence of the Ordinary. 2 Hawk. 506, 7.

2 Hale 381. Pardon void, because the King did not take notice the Party had abjured.
2 Hawk. 542.

A Man who had abjured the Realm for the Death of a Man, was brought to the Bar, and being demanded what he could say, why Execution should not be awarded. He pleaded the King's Pardon, which was disallowed, because there was no mention in it, that he had abjured; and after he prayed his Clergy, which was disallowed *ut supra*; and after he pleaded, he was taken out of a *Sanctuary*, and desired to be restored, which the Court refused, and said he should not have that Plea, because being asked what he could say, why Judgment and Exe-

* This Practice is rendered unnecessary by 12 *Geo.* 3. C. 20.

cution

cution ſhould not be given and awarded againſt him, he had pleaded his Pardon, and that being diſallowed, he ſhould not be received to plead any other Plea, which was ruled accordingly, for he was hanged. So *Note*, Tho' a Priſoner in ſuch a Caſe, muſt at his Peril plead ſuch a Plea as he will ſtand to, for it is peremptory to him if the matter, *&c.* pleaded be judged againſt him; yet after ſuch Plea, he may and ought to have the the Benefit of his Clergy.

When a Priſoner is demanded what he can ſay, why Judgment ſhould not be given, His firſt Plea is peremptory if that be over-ruled, yet Clergy allowed in that Caſe after Plea judged againſt him.

At the Seſſions for *Newgate*, 20 *April* 1664. 16 *Car.* 2. The Chief Juſtice *Hyde*, myſelf, and Juſtice *Wylde* preſent, One *John Joyner* was indicted for ſtealing a Copper, and upon the Evidence it appeared the Copper was fixed to the Freehold, and he broke it up and carried it away; And thereupon the Jury was directed by the Court, that he was not guilty, becauſe it was no Felony. But my Lord Chief Juſtice *Hyde* ſaid, that it being ſo rank a Treſpaſs the Jury might find it Specially, that he did take up the Copper, but that it was fixed, and ſo leave it to the Court, to judge whether Felony or no, and thereupon the Court judge it Treſpaſs, and fine him, and give him other Puniſhment fit for ſuch a Treſpaſs, as the Court did in *Holmes*'s Caſe, *Cro.* 1 *Part.* 376, 377. But my Brother *Wylde* and I differed in that Point, and ſaid it was not like *Holmes*'s Caſe; For there all the ſpecial Matter was expreſſed in the Indictment, *viz.* That *Holmes* being poſſeſſed of a Houſe in *London*, did *Felonice* ſet on Fire his own Houſe and burn it with intent to burn the Houſes of other Men near adjoining, and of this the Jury found him guilty, and before Judgment, becauſe the Court doubted whether it was Felony or no, the Record was removed into the *King's-Bench*, and the Advice of all the Judges taken, and agreed, that it was no Felony: And thereupon all the ſpecial Matter being in the Indictment, and he found guilty of that as it was laid, in Law it being no Felony, he was found guilty of the Treſpaſs, for which the Court gave Judgment againſt him. But in this Caſe he is indicted generally for ſtealing a Copper, which may not be fixed, and if the Jury ſhould find him guilty generally, the Court muſt give Judgment as for Felony. For the ſpecial Matter that it was fixed is not laid in the Indictment. And it would be diſhonourable or the Court in ſo plain a Caſe as this, to ſuffer the Jury

Joyner's Caſe.

Whereupon an Indictment for Felony, the Court may give Judgment for Treſpaſs.

1 Jones. 351. 1 Hawk. 166.

Jury to find a special Verdict, so all agreed that the Jury should find him not guilty, which was done accordingly, *Vide* 1 *H.* 7. 10, *b.* Though Felony includes Trespass, yet if the Party indicted be discharged of the Felony, which is Principal, he is thereby acquitted of the Trespass, *tamen Quære* of this, and *Vide* the Book.

2 Hale 500.
2 Hawk. 625.

Iocost and *Villars*'s Case. Burglary to break an House in the Night with an intent to commit Felony. 1 Hawk. 164.

At the same Sessions *John Locost* and *Lawrence Villars* were indicted for Burglary for breaking and entering a Man's House with an intent to Ravish his Wife, and were found guilty, and had Judgment to be hanged. Upon the Evidence, the Fact was very foul, for the Woman was actually ravished by one, and afterwards thrust a Torch betwixt her Legs, *&c.*

Will. Turner's Case.

If one break an House in the Night, steal Goods thence of several Men, and be indicted for that Burglary, and stealing the Goods of one of the Men, and be acquitted, he cannot be afterwards indicted for the Burglary, but may for the Felony, for stealing the Goods of other Men, which were taken out of the same House. 2 Hawk. 527.

At the same Sessions there was this Question, One *James Turner* and *William Turner*, at *Christmas* Sessions last, were indicted of Burglary for breaking the House of Mr. *Tryton* in the Night, and taking away great Sums of Money: and thereupon *James Turner* was found guilty and executed; but *William Turner* was then acquitted. And now there being great Evidence that *William Turner* was in the same Burglary with *James Turner*, and there being 47*l.* of the Money of one *Hill*, a Servant to Mr. *Tryton*, stolen at the same Time, which 47*l.* was not in the former Indictment, they would have indicted *William Turner* again now for Burglary, for breaking the House of Mr. *Tryton*, and taking thence 47*l.* of the Money of *Hills*; but we all agreed that *William Turner* being formerly indicted for Burglary in breaking the House of Mr. *Tryton*, and stealing his Goods, and acquitted, he cannnot now be indicted again for the same Burglary for breaking the House; but we all agreed, he might be indicted for Felony, for stealing the Money of *Hill*. For they are several Felonies, and he was indicted of this Felony before, and so he was indicted. And afterwards I told my Lord Chief Justice *Bridgeman* what we had done, and he agreed the Law to be so as we had directed.

At

At the *Lent Assizes* at *Cambridge*. 16 *Car.* 2. *Clement Simson* was indicted for breaking an House in the Day Time, no body being in the House, and stealing Plate to the Value of 10*l.* And upon the Evidence it appeared, that he had taken the Plate out of a Trunk in which it was, and laid it on the Floor; but before he carried it away, he was surprised by People coming into the House. And the Chief Justice *Hyde* caused this to be found Specially, because he doubted upon the *Stat.* of 39 *Eliz. Cap.* 15. That enacts, that if any one be found guilty of the Felonious, taking away any Goods, *&c.* out of any House in the Day-time, above the Value of 5s. he should not have the Benefit of his *Clergy*, Whether this were a taking away within the Statute. And on the 13 *June*, *Car.* 2. All the Judges being met together, this Question was propounded to them, and agreed that *Clergy* was taken away in this Case. For the *Stat.* of 39 *Eliz.* does not go about to declare what shall be Felony, but to take away *Clergy* from that kind of Felony. For breaking an House in the Day-time, no body being therein, and stealing Goods above the Value of five Shillings, so that the Felony is at Common Law; And by the Common Law, breaking the House and taking of Goods, and removing them from one Place to another in the same House, with an intent to steal them is Felony; For by this taking them he hath the Possession of them, and that is Stealing and Felony. *Vide* for this 27 *Ass. Pl.* 39. *Br. Corone* 107

Simson's Case. Removing Goods from one Place in an House to another by a Thief, who intended to steal them is Felony, tho' he be surprized before he carry them away. And if a Thief do so in the Day-time, by breaking an House no body being therein, his Clergy is taken away by Stat. 39 *Eliz.* if the Goods be above the value of 5*s.* 1 Hawk. 141. 1 H.P.C. 508. 527. 2 H.P.C. 358. Fost. 108. 1 Hawk. 151. in notis.

At the same Time it was propounded to all the Judges If a Man and his Wife go both together to commit a Burglary, and both of them break a House in the Night, and enter and steal Goods; what Offence this was in the Wife, and agreed by all, that it was no Felony in the Wife? for the Wife being together with the Husband in the Act, the Law supposeth the Wife doth it by *coertion* of the Husband, and so it is in all *Larcenies*; but as to Murder, if Husband and Wife doth join in it, they are both equally guilty, *Vide* 2 *E* 3. *F. Corone* 160. 27 *Ass. Pl.* 40. *F. Corone* 199. *Poulton de pace* 126, *b.* And the Case of the Earl of *Sommerset* and his Lady, both equally found guilty of the Murder of *Sir Thomas Overbury*, by poysoning him at the *Tower* of *London*.

Husband and Wife commit Larceny or Felony together, no Felony in Wife, but only the Husband is guilty, otherwise in case of Murder both guilty. 1 Hawk. 3, 4. and in notis. 1 St. Tr. 348, 351.

At

Ann Davis's Case.
1 Hawk. 121.

At the Goal Delivery for *Newgate*, holden 31 *August*, 16 *Car.* 2. my Lord *Bridgeman*, myself, and my Brother *Wylde*, Recorder of *London*, being present; *Ann Davis* was indicted for murdering her Male Bastard Child, and the Indictment was not special as the Statute is for concealing it, &c. But the Indictment was *quod Infantem masculum vivum parturiit qui quidum infans masculus adtunc & ibid. vivus existens natus per legem hujus regni Angl' spurius fuit*, *Anglice*, a Bastard, and then goeth on in the ordinary Form, that she murdered it, and doth not conclude *Contra formam Statut.* And it was doubted by us, whether the Indictment ought not to be special. And we caused Presidents to be searched, and 2 *Car.* 1. there was a special Indictment, but after 4, 5 & 6 *Car.* 1. All the Indictments were as this is, and Mr. *Lee*, Clerk of the Peace for *London*, said that the Form was altered, and made as it is now by the Advice of the Judges at that Time, who agreed that Clause which is now in the Indictment, should be put in and to conclude generally *contra pacem*, &c. and not to conclude, *contra formam Statut.* For Murder was an Offence at Common Law; and the Statute declareth, that where the Child is concealed, it shall be taken to be born alive, and if it be dead it shall be taken, that it was murdered, and so the Statute doth not make a new Offence, but maketh a Concealment to be an undeniable Evidence that she murdered it; and so the Court was satisfied, and went on upon the Indictment, and upon the Evidence it appeared, that the Prisoner lived in a Chamber by herself, and went to Bed on *Thursday* Night well, without any Pain, and in the middle of the Night waked full of Pain, and knocked for some body to come to her, and one Woman heard her knock, but came not to her, and the same Night she was delivered of a Child, and after she put the Child in a Trunk, and did not discover it till *Friday* Night following, and this was found specially to have the Advice of all the Judges, whether that knocking for help at the Time of her Travel (altho' she concealed it after one Day) exempts her from that Statute. For there was no sign of any Hurt upon the Body of the Child. But thus far it was agreed by us, that if there be an intent in the Woman to conceal the Child, then it is Murder by that Statute, though in truth

2 Hawk. 618, 619.
2 Hale 228, 9.
2 H.P.C. 289.
Special Verdict.

truth the Child was dead born. But if there was no Intent to conceal it, or if *she confess herself with Child* before hand, and after she is surprised and delivered, no body being with her, this is not within the Statute, because there was no intent to conceal it, and therefore in Case, if there be no sign of hurt upon the Child, it is no Murder.

If no intent to conceal the Child, not Murder, within the Statute. 2 Hawk. 619.

At the same Sessions *Joseph Clarke* was indicted in *London* for High-Treason, for Coining of Money, and upon the Evidence it was proved against him in *London*, as it ought to be, the Indictment being there, but a great deal of more Evidence was given against him of committing the same Crime in *Middlesex*, and in *Essex*, which was agreed to be good Evidence to satisfy the Jury.

Joseph Clark's Case for coining of Money.

Vide Devant. 15, a.

One *Richard Oliver* who had been partner with him in the Crime, and formerly convicted for that Crime, and had obtained the King's Pardon, was used as a Witness against him, together with other Witnesses. And it was agreed by us all, that the bare uttering of false Money, though the Party know it be false Money, is not High-Treason, nor Misprision of Treason; For nothing is Misprision of High-Treason but concealing it, yet the uttering of false Money is a great Misprision finable, if the Party know it to be false: But if he that utters it know the Person that coined it, or if one help a Coiner with Instruments and Tools to coin withal, or furnish him with Silver for his coining, and Money is coined accordingly, in every of these Cases it is High-Treason in them who utter the Money, or assist the Coiner with Materials, for they are all aiding to the Treason; and in High-Treason, every one who giveth aid or assistance to it, are Principals; for there are no Accessaries in Treason, and they are guilty of Coining as well as he that coined it.

Oliver's Case. 2 Hawk. 609, 1 H. P. C. 304. in notis.

1 Hawk. 62.

A Form of Conviction for High Ways, by the View of a Justice of Peace, which he is to return to the next Sessions, and a Form of an Order thereupon, which I had from my Lord *Hyde*.

Bedford. 1 Hawk. 414. Sect. 71. *Memorand' quod Un'——Justiciar' Dom' Regis ad pacem in Com. præd. conservand' nec non ad diversas felonias & transgression' & al', malefacta in eod. Com' perpetrat' audiend & terminand' assignat' ad hanc Generalem Sessionem. Pacis Com. præd. tent. apud——infra Com. præd.——die &c. Anno Regni Dom, &c. coram prefat.—&—Justic. pacis in Com. præd. virtute Statut. Dom. Eliz. nuper Reginæ Angl' in Parliamento tent' apud Westmon' 12 die Jan. Anno nuper Reginæ 5 & secundum formam & effectum dict. Statut. Intitulat.* An Act for the reviving of a Statute made *An.* 2 & 3 *Phil. & Ma.* for the mending of High-ways, *super propriam notitiam suam presentavit qd. Quædam cumunis & Antiqua Regia via infra paroch. præd. in Com præd. quæ ducit de Paroch. præd. ad de—villam in Com. præd. (mercatoriam villa existen.) a quodam loco vocat. in Paroch. præd. usque ad quendam pontem communiter vocat. in Parocha prædict non est bene & sufficient. reperat. & emendat. secundum formam & effect Statut. præd. sed modo est in magno decasu ita quod subditi dic. Dom. Reg. per viam præd cum equis, plaustris, Carrucis & Carriagijs & al' necessarijs suis prout solebant & debent absque magno periculo transire seu laborare non possunt in cujus rei testimonium præd. —manum & sigillum suum apposuit.*

Ordo super inde. *Super quo ad eandem General' Sessionem pacis ibid' tent. die & anno supradictis, præd. Justiciarij Dom. Regis ad pacem Dict. Dom. Regis in Com. præd. conservand. assig. nat. assessaver. & imposuerunt finem* 40l. *levand. de Inhabitantibus dict' Paroch. de—in quorum Defect' via pred' non est bene & sufficienter reparat secund. formam Stat. præd. si præd. via non sit sufficienter reparat. & emendat. ante Festum sci' Johannis Baptist. prox. futurum.*

What only is traversable on this Conviction. *Vide Saunders Reps. 2 p.* 160. *Memorandum,* Upon such a Conviction the decay of the High-way cannot be traversed, but they may plead, that some other Person ought to repair it, and traverse that they ought not, but the decay being upon View of a Justice of Peace cannot be gainsaid or traversed.

This

This is the best way to have all High-ways amended if the Justices of Peace would do their Duty. My Lord *Hyde* also told me, that it was resolved by all the Judges in *Gaye*'s Case, 2 *Car.* 1. that if a Recusant who was proclaimed at the Assizes according to the Statute, render himself the next Assizes to plead or traverse, &c. he must appear in Person, and he is to be in Custody; for the Words of the Statute and of the Proclamation are, that he shall render his body to the Sheriff of the County.

Gaye's Case. Recusant after Proclamation to appear in Person, and to be in Custody.

At the Sessions in the *Old Bailey* holden there the 12 *October* 1664. A *Silk Thrower* had Men come to Work in his own House, and delivered Silk to one of them to Work, and the Workmen stole away part of it. It was agreed by *Hyde* Chief Justice, myself, and Brother *Wylde* being there, that this was Felony, notwithstanding the delivery of it to the Party, for it was delivered to him only to Work, and so the entire Property remained then only in the Owner, like the Case of a *Butler*, who hath Plate delivered to him; or a Shepherd, who hath Sheep delivered, and they steal any of them, that is Felony at the Common Law, *Vide* 13 *Eliz.* 4. 10. 3 *H.* 7. 12. & 11 *H.* 7. 14. *accord. Poulton de pace* 126.

Felony in Goods, notwithstanding the Delivery of them. 1 Hawk. 135. in notis.

At the same Time there being Discourse, about the restitution of Goods stolen, (to the Owner, who had prosecuted the Thief) my Brother *Wylde* said that it had been resolved upon the Words of the *Stat.* of 21 *H.* 8. *Cap.* 11. which giveth restitution of stolen Goods to the Owner in case the Thief be upon his Evidence found Guilty, that notwithstanding a Sale in a Market Overt by the Thief of the Goods stolen; yet the Party shall have Restitution: And he said, so was the Practice at the *Old Bailey*. But my Lord *Hyde* and myself, were of a contrary Opinion, because at Common Law, a Sale in a Market Overt by a Party who hath no Property shall bind the Right of the true Owner, and so is *More Rep.* 360. The Bishop of *Worcester*'s Case, where to a Restitution granted at a Sessions of *Newgate*, the Party who had brought the Goods pleaded a Sale to him in a Market Overt, there the Case was adjudged against the Defendant, because it appeared not to be a Sale in a Market Overt. For it was Plate sold in a Scrivener's Shop in *London*. But there no Question

Restitution of stolen Goods, if grantable to the Prosecutor upon the Statute in case the Goods were sold in a Market Overt. 2 Hawk. 250. 1 H.P.C. 543.

is made, but that a Sale in a Market Overt would have hindered the reſtitution, and bound the Property of the right Owner. And by the *Stat.* of 31 *Eliz. Cap.* 12. which in caſe of Horſes ſtolen, enabled the Owner to have Reſtitution if he claim them, within ſix Months after they are ſold by the Thief in a Market Overt, and yet that is, if the Owner pay the Party who bought the Horſe in the Market Overt, ſo much as he will ſwear he paid *bona fide* for the Horſe: But this Reſtitution of Horſes upon the *Stat.* of 31 *Eliz.* hath no great Relation to that Reſtitution upon the *Stat.* of 21 *H.* 8. they being of two ſeveral Natures, therefore *Quære legem Vide poſtea* 18, a. *con.* and ſo is the conſtant Practice.

One challenged 36, hanged and not preſſed. 2 Hawk. 461, 462.

3 *H.* 7. 12. *a.* One arraigned before *Fairfax Bryan*, and *Haugh* at *Newgate* for Felony, challenged 36, and the Queſtion was, what ſhould be done with him, and all the Judges of the one Bench and the other agreed, that he ſhould be hanged and not preſſed to Death, and this Rule they would have all the Judges to obſerve in their Circuits, notwithſtanding the Opinion *tempore E.* 4. to the contrary; and yet in the very ſame Page it is ſaid in another Caſe upon the like Challenge, the Book ſaith the Opinion was, that he ſhould be preſſed as a Perſon that refuſed the Law.

One abjureth for Felony, and being after taken in *England* he ſtands mute, he ſhall be hanged; but 26 *Aſſ. Pl.* 19 *Br. Payne* 12. is to the contrary, but that ſeemeth not to be Law. 2 Hawk. 461, 462. As to ſtanding mute, where the Judgment ſhall be to be preſſed, and where proceed to Tryal and put him upon the Jury.

30 *Aſſ. Pl.* 3. *Br. Payne* and *Penance* 2. One abjureth and is after taken in *England*, and demanded what he could ſay, why Execution ſhould not be awarded, he ſtands mute, he ſhall be hanged, and not put to penance or preſſed; becauſe he was attainted of the Felony before by his Confeſſion: For he cannot have the Benefit of the Sanctuary to abjure, unleſs he confeſs the Felony which is entered on Record by the Coroner; and there its ſaid, if a Felon plead not guilty upon his Arraignment, and after ſtand mute before his Tryal, it is as if he had not pleaded: But if upon his Arraignment he confeſs the Felony, and after being demanded what he can ſay, why Execution ſhould not be, he ſtands mute, there he ſhall be hanged. *Note*, It ſeems to me, that in the Caſe before, where it is ſaid a Felon pleads not guilty, that if after, upon his Tryal he ſtand mute, yet the Jury ſhall be charged with him, and Evidence given for the King; and if he be found guilty he ſhall be hanged; for after the Priſoner hath pleaded once not guilty he cannot hinder the Tryal,

and

and therefore I suppose that Case is to be intended when the Prisoner only pleaded not guilty, and being asked how he would be tryed, stands mute, and refuses the Tryal of Law, there the bare pleading of not guilty is as nothing; but in case he pleaded not guilty, and for Tryal puts himself on the Country, then if after he stands mute, yet the Court shall proceed to his Tryal, and so the Book of 15 *E.* 4. 33. *Br. p.* 9. A Felon is arraigned and pleads not guilty, and puts himself upon his Country, and then challenged 31, and thereupon is a *Tales* granted, and then he stands mute, and the Jury was charged with him and found guilty.

2 Inst. 178, 9. 2 Hawk. 464.

Vide 2 Hawk. 463. Note to Sect. 7.

In an Appeal for Felony if the Prisoner stands mute, he shall have Judgment to be pressed, as in case he had been arraigned at the King's Suit, and stands mute. 43 *Ass. pl.* 30. *Br. Payn.* 13 & 14 *E.* 4. 7. *Br. ibid.* 15.

Mute in Appeal the same Judgment as upon Indictment.

At the Sessions at the *Old Bailey* the 7*th Decemb.* 1664, one *Jone Jenes*, together with one *Thomas Wharton*, were indicted for Burglary, and she pleaded herself to be married to *Wharton*, on Purpose to be excused, being with her husband at the Burglary, and she refused to plead by the Name of *Jones*, and thereupon we called for the Jury, which found the Indictment, and in their Presence, and by their Consent *, we made the Indictment as to her Name to be *Jane Wharton alias Jones*; but we did not call her *Jane Wharton* the Wife of *Thomas Wharton*, but gave her the Addition of *Spinster*; and then she pleaded to it, and the Court told her, that if upon her Tryal, she could prove that she was married to *Wharton* before the Burglary committed, she should have the Advantage of it: But on the tryal she could not prove it, and so was found guilty, and Indictment given upon her.

Jone Jenes Wharton's Case. A Woman in the same Felony with a Man, pretends to be his Wife; the way of Indictment in that Case. 2 Hawk. 348.

At the same Sessions, at the Tryal of a Prisoner, he took Exception against the Witness against him, because he had formerly been burned in the Hand for Felony; but the Chief Justice *Hyde*, *Kelyng*, and *Wylde*, *Recorder*, being present, held that to be no Exception, and in civil Causes such Persons are frequently admitted for Witnesses; and it differs from cutting off Ears, standing in

Burning in the Hand for Felony, no Exception against his being Witness. *Bulstrode* a *part* 155. 2 Hawk. 609.

10. One attainted of Felony and pardoned is no good Witness. *Modus decimam di* so proved, disallowed.

* *Note*, the Jury Consent at the Time they are Sworn.

the

the Pillory or other ſtigmatizing, becauſe thoſe Puniſhments make the Perſon Infamous, and ſo he is not allowed for a Witneſs: But burning in the Hand does not ſo, becauſe it cometh in the place of Purgation at the Common Law, which ſuppoſeth he might be not guilty, notwithſtanding the Verdict. And therefore at the Common Law, he that confeſſeth a Felony, could never be admitted to his Purgation, for there could be no Preſumption of not guilty againſt his own Confeſſion. *Vide Godbolt* 288.

By the Statute of 18 *El.* 17. He who hath Clergy, is totally diſcharged. *Vide Membr. fol.* 25.

If Clergyman burned in the Hand, and after ſued to be deprived for that Cauſe, prohibition. *Vide Co.* 5. *c.* 110. *Foxley's* Caſe, and it is in lieu of Purgation, which admits guilty, eſpecially after Judgment and Attainder. 2 Hawk. 511, 558.

At the ſame Time and Seſſions, One *Iſaac Marriot*, and others were committed, and the *Mittimus* was for refuſing to take the Oath of Allegiance, and ſo the Juſtice of the Peace thought to bring them into a Premunire; but the Court diſcharged him and the Reſt, becauſe the Oath intended was the Oath injoined by the Statute of 3 *Jac. Cap.* 4. and it is not an Oath of Allegiance, though it be commonly ſo called; but in truth it is an Oath of Obedience, and ſo the Court diſcharged them, becauſe there was no ſuch Oath of Allegiance, &c.

Marriot's Caſe. One committed for refuſing the Oath of Allegiance, diſcharged as no ſuch Oath to induce the Penalty of Premunire.

At the ſame Seſſions, upon the Tryal of ſeveral Quakers for their third Offence after two former Convictions before the Juſtice of Peace upon the Statute of 16 *Car.* 2. *An Act to prevent and ſuppreſs ſeditious Conventicles;* One of them pleaded, that he was an Alien born in *France*, and ſo not within the Penalty of that Act, becauſe the Statute ſays, *that every Perſon above the Age of* 16 *Years, eingh a Subject of this Realm, ſhall*, &c. And he ſaid he was no Subject, and ſo not within the Law: It was agreed by us all, that if an Alien come into this Kingdom, and live under the King's Protection, that as long as he liveth here he is a Subject of this Realm, and puniſhable for tranſgreſſing the Laws thereof, according to *Calvin's* Caſe, *Co.* 7 *Rep.* 6, *b.* and ſhall be indicted for High-Treaſon, and the Indictment concludes *contra Allegianc' ſuam debitam.* But if the Statute had ſaid been a Natural-born Subject of this Realm, then it had not extended to him, and that alſo appeareth by the penning of ſeveral Statutes, ſome being generally Subjects, or all Subjects, &c. which extend to Aliens which live here, and other, that all Natural-born Subjects,

An *Alien* living here, is a Subject within the Statute of Quakers.

Subjects, which extend to them only who are such, and not Aliens who live here, and accordingly we proceeded against him, and he had Judgment to be transported.

Trollop's Case. A Carrier hath Goods delivered, and is robbed, the Indictment is good, that he stole the Goods of the Carrier.

At the same Sessions, *Francis Trollop* was indicted for stealing the Goods of *Matthias Bowyer*, and upon the Evidence it appeared, that the Goods were not *Bowyer's*, that he was a *Glostershire* Carrier, and in his Journey they were stolen from him, and agreed that the Indictment was well enough, for tho' he had not the absolute Property, in the Goods, yet he had a possessory Property, for which he may maintain an Action of Trespass against any one that took them from him; and so may indict a Thief for taking his Goods, and so the Indictment is good either for stealing the Goods of the Carrier or of the right Owner.

Fabian's Case. Goldsmith for falsifying Plate.

At the same Sessions, One *Joseph Fabian*, a working Gold-smith, was indicted for falsifying Plate, and by putting in too much Copper, made it some Pieces 2*d.* in others 3*d.* 4*d.* 5*d.* 6*d.* 7*d.* in the Ounce worse than it ought to be, and then corrupted one of the Essay Masters Servants to help him to the old Marks of the *Leopard's* Head, and other Marks which are set on Plate when it is essayed and found good, and with those Marks he marked his false Plate at his own House, and so he sold his Plate to the selling Gold-smiths, who did not mistrust it, because they saw it marked: For the Essay Master is so curious, that if the Plate be a fourth Part of a Farthing more than it ought to be, they break it in pieces, and the old Marks ought always to be broken in pieces when new Marks are made. And because the Essay Master had not caused those old Marks to be broken, he was turned out of his Office, and *Fabian*, who was found guilty, Judgment. fined 100*l.* and adjudged to stand in the Pillory three Days, from Eleven of the Clock until One, that is to say, once at the *Old Change*, and another Time in *Cheapside*, Fore-judged and the third Time before *Goldsmiths Hall*, with a Paper not to use his in his Hat, declaring his Crime, and he was also fore-Trade as a judged of his Trade, that he should not use that Trade Master again as a Master Workman. Workman.

In

Hull's Case. In the Sessions in the *Old Bailey* holden the 13 of *January* 1664, One *John Hull* was indicted for the Murder of *Henry Cambridge*, and upon the Evidence, the Case was, that there were several Workmen about building of a House by the Horse-Ferry, which House stood about 30 Foot from any High-way or common Passage, and *Hull* being a Master Workman (about Evening when the Master-workman had given over Work, and when the Labourers were putting up their Tools,) was sent by his Master to bring from the House a piece of Timber which lay two Stories high, and he went up for that piece of Timber, and before he threw it down, he cried out aloud, Stand Clear, and was heard by the Labourers, and all of them went from the Danger but only *Cambridge*, and the piece of Timber fell upon him and killed him: and my Lord Chief Justice *Hyde* held this to be Manslaughter, for he said he should have let it down by a Rope, or else at his Peril, be sure no Body is there: But my Brother *Wylde* and mylelf held it to be Misadventure, he doing nothing but what is usual for Workmen to do: And before he did it, crying out aloud, Stand Clear, and so gave notice if there were any near they might avoid it; and we put the Case, a Man lopping a Tree, and when the Arms of the Tree were ready to fall, calls out to them below, Take Heed, and then the Arms of the Tree fall and kill a Man, this is Misadventure; and we shewed him *Poulton de pace* 120. where the Case is put, and the Book cited, and held to be Misadventure; and we said this Case in Question is much stronger than the Case where one throws a Stone or shoots an Arrow over the Wall or House, with which one is slain, this in *Kelloway* 108 & 136. is said to be Misadventure. But we did all hold that there was a great difference betwixt the Case in Question, the House from which the Timber was thrown standing thirty Foot from the High-way or common Foot-path, and the doing the same Act in the Streets of *London*; for we all agreed, that in *London*, that if one be a cleansing of a Gutter, called out to stand aside, and then throw down Rubbish, or a piece of Timber, by which a Man is killed, this is Manslaughter; being in *London*, there is a continual concourse of People passing up and down the Streets,

Manslaughter and Misadventure in what Cases. 1 Hawk. 111. 1 H.P.C. 475. Fost. 263. *See the Rules there laid down.*

London Streets and a Country-town much differ.

Streets, and a new Paſſenger, who did not hear him call out, and therefore the caſting down any ſuch Thing from an Houſe into the Streets, is like the Caſe where a Man ſhoots an Arrow or Gun into a Market-place full of People, if any one be killed it is Manſlaughter; becauſe in common Preſumption his Intention was to do Miſchief, when he caſts or ſhoots any Thing which may kill among a multitude of People; but in caſe that an Houſe ſtanding in a Country-town where there is no ſuch frequency of Paſſengers, if a Man call out there to ſtand aſide, and take heed, and then caſt down the filth of a Gutter, &c. my Brother *Wylde* and I held that a far different Caſe from doing the ſame Thing in *London*. And becauſe my Lord *Hyde* differed in the principal Caſe, it was found Specially, but I take the Law to be clear, that it is but Miſadventure.

Murder. 1 H.P.C. 475. in notis. Foſt 263. 1 H.P.C. 472. 2 Hawk. 111. Bract. l. 3, 64. Dalt. 1, 96. B. Cor. 229.

At the ſame Seſſions *James Rampton* was indicted for the Murder of his Wife; and upon the Evidence the Caſe was, that he being a *Hackney Coachman*, found a Soldiers Piſtol in the Street, and when he came home he ſhewed it to his Maſter, and they took the Gun-ſtick and put it into the Piſtol, and it went down into the Muſſel of the Piſtol, by which they thought it was not charged, and his Wife ſtanding before him, he pulled up the Cock and the Piſtol went off, and being charged with two Bullets, wounded her in the Belly, and killed her, upon which he cried out, Oh I have killed my dear Wife! and called in Neighbours, it was holden by *us all, that this was Manſlaughter, and not only Miſadventure.*

Rumpton's Caſe. Manſlaughter, Miſadventure. 1 Hawk. 112.

Quære *.

At the Common Law, if a Man had committed ſeveral Felonies, and had been arraigned for one, and prayed his Clergy, yet he might be indicted for any other Felony, and thereupon was made the Statute of Clergy, 25 *Ed.* 3. *C.* 5. which required that a Clerk be charged with all Felonies, at once. And after that Stat. if a Man had committed ſeveral Felonies, ſome within Clergy and ſome without Clergy, and had been arraigned of one of the Felonies within Clergy and convicted of it, and his Clergy allowed for that, he was diſcharged thereof and could not be tried for any of the other Felonies which were committed betwixt the firſt Felony and the Time of the Allowance of his Clergy for it, tho' the other Felons was without

Clergy allowed where may be put to anſwer for other Felonies notwithſtanding.

Vid. Recital 8 *El. Cap.* 4. agreed the Law ſo. 2 Hawk. 10.

* The learned Editor was not ſatisfied with this Judgment. See Foſt. 263, 264, 265.

Benefit of Clergy, *Stam. pl. Cor.* 107, *b. Coke. pl. Cor.* 214. but now by the Statute of 8 *Eliz. C.* 4. if Clergy be allowed, that both discharge all other Felonies within Clergy; but he may be arraigned for a Felony, for which Clergy is not allowable, though it were committed before his Clergy were allowed: *Co. Pl. Cor.* 214. But now by the Statute of 18 *Eliz. C.* 7. it seems that although Clergy hath been allowed for one Felony he may be indicted for another Felony also within Clergy committed before the Time that his Clergy was allowed; for that Statute of 18 *Eliz.* speaks generally that all Persons admitted to the Benefit of the Clergy shall notwithstanding answer to all other Felonies whereof they shall be indicted or appealed, and not being thereof before acquitted, convicted, attainted, or pardoned; and if this be not the meaning of this Statute, then it is to no purpose; for all the other Cases where Clergy was not allowable were helped by the Statute of 8 *Eliz. Cap.* 4. before mentioned. And my Lord Chief Justice *Hyde* told me that when his Uncle Sir *Nicholas Hyde* was Chief Justice, he meeting with a notorious Rogue for stealing of Sheep and Cows all being within Clergy, caused him to be tryed upon one of the Indictments, and presently called the Ordinary, and upon his return, that he read, he allowed him his Clergy; and then after he tryed him at the same Assizes upon the other Indictments, upon which he was convicted, and demanded his Clergy, which he denied him, because he had had his Clergy once allowed him, and so the Fellow was hanged: But yet the Practice at the Sessions at the *Old Bailey* is contrary to this, and so that Statute of 18 *Eliz.* made of no Effect. *But notwithstanding the Practice is conceived to be according to Law.*

Le Mott's Case. Burglary *in fraudem Legis.* 1 Hawk. 161. 1 H.P.C. 507. 1 H.P.C 552. 4 Black.Com. 225.

At the Sessions I inquired of *Le Mott's* Case, which was adjudged in the Time of the late Troubles, and my Brother *Wylde* told me, that the Case was this: That Thieves came with intent to rob him, and finding the Door locked up, pretending they came to speak with him, and thereupon a Maid Servant opened the Door, and they came in and robbed him, and this being in the Night Time, this was adjudged Burglary, and the Persons hanged; for their Intention being to rob, and getting the Door open by a false Pretence this was *in fraudem Legis,*

gis, and so they were guilty of Burglary, though they did not actually break the House, for this was in Law, an actual breaking, being obtained by fraud to have the Door opened; as if men pretend a Warrant to a Constable, and bring him along with them, and under that Pretence rob the House, if it be in the Night, this is Burglary.

Farr's and *Chadwick's* Case. 1 Hawk. 163. 1 H.P.C. 552. Foster 77. Robbers *in fraudem Legis* by colour of lawful Pretences.

At the Goal delivery in the *Old Bailey*, 5 *April*, 1665, Lord Chief Justice *Hyde*, myself, and my Brother *Wylde*, Recorder of *London*, then present, one *Richard Farre*, and *Eleanor Chadwick* were indicted for breaking the House of *Robert Stanyer*, and putting his Wife in fear, and stealing from thence several Goods; and upon the Evidence, the Case was that Mrs. *Stanyer* whose House was robbed, had for many Years lived from her Husband, and hired this House, and a Lease was drawn up for the House in her Husband's Name, which he refused to seal, and said he would have nothing to do with, but the Landlord and she agreed, and she constantly paid the Rent, and had the House very well furnished, and had Plate, Jewels, and Houshold Stuff of very good Value, and *Farre* the Prisoner, and *Eleanor Chadwick*, who lived with him as his Whore, and so had done a great while, intending to rifle her House, laid this Design, viz. *Farre* went to an Attorney of the *Common Pleas*, and told him that Mrs. *Stanyer* was his Tenant and in Arrear for Rent, and he had no way to get her out but by *ejection. firmæ*, and thereupon, he according to the Way now used, made a casual Ejector of his own and delivered a Declaration, and *Eleanor Chadwick* made false Oath in the Common Pleas, that she had delivered a Copy of that Declaration to the Tenant in Possession, and thereupon Judgment was obtained (according to the Course) against the casual Ejector, and a Writ to the Sheriff to deliver Possession, and thereupon *Farre* got the Sheriffs Bailiffs to execute the Writ, and turn Mrs. *Stanyer* out of Possession, and at the same time *Farre* took out a *Latitat* against Mrs. *Stanyer*, supposing a debt, and at the same Time arrested her and would take no Bail, but caused her to be carried to *Newgate*, and then *Farre* and *Chadwick* went to rifle her Goods in the House, and broke open Cubbards and

Vide postea and *Coffel's* Case. 1 Hawk. 136. 1 Sid. 254, S.C. Raym. 276.

Trunks, and took away Jewels and Plate, and carried them into his own Houſe, and hid them there, and carried away divers of the Goods by Night, and took the Pewter which had her Huſband's Arms upon it, and got them taken out, and ſold other of the Goods; and after upon Complaint to my Lord Chief Juſtice, by his Warrant *Farre*'s Houſe was ſearched, and the Jewels and Plate there found, and divers other Goods; and *Farre* and *Chadwick*, upon Examination by my Lord Chief Juſtice, were ſent by him to *Newgate*, and now this Indictment preferred againſt them, and *Farre* being aſked what colour of Title he had to the Houſe, could pretend none, but it appeared that the true Landlord had received the Rent of it for many Years, and that no Rent at all was behind. And *Farre* being aſked what cauſe of Action he had againſt Mrs. *Stanyer* to cauſe her to be arreſted, could pretend none; and being likewiſe aſked what colour he had to break open Trunks and Cubbards, and to take the Goods and ſell them, and cauſe the Coat of Arms to be expunged, he could make no pretence; and it was agreed by us all, that although they had made uſe of the Law and Officers of Law to get the Poſſeſſion and to arreſt the Woman, yet if all this done in *fraudem Legis* with intent to Rob, this courſe was ſo far from excuſing the Robbery, that it heightened the Offence by abuſing the Law, and the Proceſs of it without Colour of Title, &c. As *Co. Pl. Cor.* 64. if Thieves pretending to be robbed, raiſe Hue and Cry, and call a Conſtable in the Night, and cauſe him to ſearch an Houſe on pretence the Thieves are there, and thereupon, by Command of the Conſtable, the Door is opened, and they go in, and then rob the Houſe, this is Burglary, though the Houſe was not actually broke open by them, but opened at the Command of the Conſtable, for this being *in fraudem Legis* ſhall be accounted as an actual breaking in them, and ſo was *Le Mott*'s Caſe adjudged, which is in this Book the next Caſe before this, and ſo it hath been adjudged, that if Goods are diſtrained, and put in a Pound, and one who hath a Deſign to ſteal them, goeth to the Sheriff and gets a Replevin for theſe Goods, and by colour of this Replevin, the Goods are delivered to him, and he driveth them away and ſells them, having no colour of Title to them, this is Felony. And we alſo agreed, that altho' Mr. *Stanyer* the Huſband did not dwell

in

in this Houſe, and refuſed to have to do with it, yet the Indictment was well, for breaking open his Dwelling Houſe, for whatever the Wife hath is the Huſband's in Law, and it cannot be ſaid to be the Wive's Houſe, and ſo Direction was given to the Jury, that if they did believe that the Priſoners had done all this with an intent to rob, they ought to find them guilty, and the Jury did find them guilty, and both of them had Judgment to be hanged, and were executed accordingly.

Copeland's Caſe. Reſcuing a Felon by ſecret helping him away from the Place where Priſoners are put at the Time of Tryals in the Old Bailey. Vide Stamford *Pl. Cor.* 30, 31, 32. Of breaking Priſon and Reſcous.

At the ſame Seſſions, one *Edward Parret* was in the Place where the Priſoners uſe to ſtand at the Goal-delivery, who was in for Murder, for which he had afterwards Judgment, and while he was there, one *John Copeland* a *Scotchman*, being in very good Clothes, went in thither under colour to ſee him, and watching the Time when the Keepers were buſie, he opened the little Door which was bolted, and went out, and *Parret* the Priſoner followed him, and the Keeper of the outward Door not knowing them, opened that to them, and they both went together out of the Yard, and run down By-Allies into *Shew-Lane*, and ſo to *White-Fryers*, but the Keepers preſently miſſing the Priſoner, made after them, and being told which Way they run, overtook them in *White-Fryers*, and brought them both back, and thereupon *Copeland* was indicted for Felony, for reſcuing *Parret*, being indicted for Murder, and upon the Evidence it was ſworn that after they were taken, *Copeland* ſaid he had done nothing but what he ought to help away his Friend, who was in danger of his Life, and on this Evidence he was found guilty, and on his Requeſt he being to have Clergy, it was allowed to be put into the King's Pardon, amongſt thoſe Priſoners of that Nature, who were to be ſent beyond the Sea, it having been lately uſed, that for Felonies within Clergy, if the Priſoner deſire it, not to give his Book, but to procure a conditional Pardon from the King, and ſend them beyond the Sea to ſerve 5 Years in ſome of the King's Plantations, and then to have Land there aſſigned them according to the uſe in theſe Plantations, for Servants after the Time expired, with a Condition in the Pardon to be void if they do not go, or if they return into *England* during ſeven Years, or after without the King's Licenſe *.

* As to Tranſportation, ſee 1 Hawk. 244, Ap. 13th, and 2 Hawk. 514, Chap. 35, continued per totum.

At

Houſe robbed in the Night after Goods brought into it, and whilſt he is removing thither. 1 Hawk. 162. 1 H.P.C. 556. in notis.

At the ſame Seſſions one was indicted for Burglary, for breaking open a Houſe in the Night, and ſtealing away Goods, and upon the Evidence, the Caſe was, that he whoſe Goods were ſtolen, had hired the Houſe which was broke open in the Night, and had the Poſſeſſion delivered him, and had removed ſeveral of his Goods from the Houſe he formerly lived in, to the Houſe which he had newly hired, but lay in his firſt Houſe till he had removed the Reſt of his Goods, and fitted his new Houſe, by ſetting up Beds to lie there: And in this Time, before he had lodged in his new Houſe, that Houſe was broke open in the Night, and his Goods ſtolen. And it was doubted whether this were Burglary, becauſe ſome of us held it could not be ſaid to be his Manſion-houſe before ſuch Time as he had ever inhabited it, but others of us ſaid it would be a very miſchievous Caſe that Thieves might take ſuch an Opportunity to rob in the Night, and have Benefit of the Clergy; and if a Man have a Dwelling-houſe, and on Occaſion, he and his Family be out of it all Night, and then it is robbed, this is without Queſtion Burglary, and in this Caſe by taking the Houſe to inhabit, and bringing his Goods thither in order to inhabit, and forbearing the Lodging only untill his Goods and Beds can be ſet up, this might well be called his Manſion-houſe, and ſhould be ſo eſteemed in Law, *Ideo Quære Legem.*

Gardner's Caſe. Soldiers breaking open Houſes by Warrant to ſearch, &c. Tremaine 355.

At the ſame Seſſions Mr. *Martin Gardner*, and other Officers and their Soldiers, to the number of Nineteen, were indicted for breaking open the Houſe of *Jonathan Hutchiſon* near *Cheapſide* in the Day time, and putting him in fear, &c. and ſtealing away ſeveral Goods, and upon the Evidence, the Caſe was that the Lord *Arlington*, the King's Secretary, by Order from the King made a Warrant to apprehend certain Perſons named in the Warrant being dangerous Perſons; and this Warrant was directed to one of the King's Meſſengers, and he having Notice that thoſe Perſons named in the Warrant were at a meeting in *Hutchiſon*'s Houſe, deſired thoſe Soldiers to aſſiſt him in the taking of them, whereupon they came to the Houſe, and broke open the Door, and apprehended ſome of them, but in the doing of it, ſome of the common Soldiers without the Knowledge of their Officers, and againſt

againſt their command took away a Cloak, and ſome ſmall Things out of the Houſe, but the Witneſſes could not tell which of the Soldiers they were, but ſaid, my Lord *Mayor* who took the Examinations could fit them upon the Perſons; and my Lord *Mayor* being now abſent, upon Occaſion of the Death of Sir *Thomas Vyner*, who died this Morning, I conceiving it neceſſary to ſay ſomething to ſatisfy the Citizens and others ſtanding by, did to this Effect declare the Law, That if ſeveral Perſons come into a Houſe together with an intent to ſteal, if but one of them ſteal Goods, they are all equally guilty. 2. That this Warrant now produced was not ſufficient to juſtify the breaking open the Doors of the Houſe, and Soldiers ought not on any Pretence to break open Houſes unleſs they have with them a Civil Officer, as Juſtice of the Peace, or Conſtable. 3. That if Perſons have a Warrant to apprehend any one, and they in order to execute the Warrant break open a Door, and miſtake the Law in that Point; this breaking of the Door maketh them Treſpaſſers, but can never be interpreted to make them guilty of Felony; for their Deſign was not to commit Felony, and there muſt be always a felonious Intent to make a Felony. 4. If after a Door broken with intent to apprehend a Perſon, any of the Company take away any of the Goods from the Houſe, this is Felony in the Perſon that did it, and in none of the Reſt; unleſs it can be proved that any of the Reſt were aſſenting to the taking of the Goods, and then it is Felony in as many as conſented; and after this done, by reaſon the Evidence could not be made out without the Examinations taken by my Lord *Mayor* and he was abſent, therefore I diſcharged the Jury of them, and ordered Bail to be taken of them to appear the next Goal-delivery *.

Where the breaking open a Houſe Felony, and where not. 2 Hawk. 441.

By Colour of a Warrant. 2 Hawk. 442.

Ante 26, and Poſt 52. 2 H.P.C. 295. Sed Vide Poſt. 16, 39, 76, 328.

Vide, This Book before, concerning Reſtitution of ſtolen Goods to the Proſecutor. If upon his Evidence, or Evidence proved by him, the Thief be convicted, I have made a great inquiry, and find that my Brother *Wylde* was in the Right, for the Words of the *Stat.* of 21 *H.* 8. *C.* 11. are general, that where the Thief is convicted at the Proſecution of the Party robbed, there the Party robbed ſhall have Reſtitution, and taketh no Notice whether

Ante 35.

* Diſcharging the Jury of Offenders, ſeems all through this Book, to have been the Practice in the Time of Kelyng; ſee the Caſes in the Margin, but ſee the contrary are the Rules then referred to.

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the Goods be ſold in a Market Overt, or not; ſo by that Statute the Common Law is altered as to that Point. And for that *Stat.* of 31 *Eliz. Cap.* 12. concerning Horſes ſtolen, and ſold in a Market Overt, the Owner may have them again if he make claim within ſix Months, and pay the Buyer what he paid *bona fide*, that is nothing to this Caſe. For that Statute giveth that kind of Reſtitution as to Horſes, altho' there be no Proſecution. And for the Biſhop of *Worceſter*'s Caſe, 'tis true, the Inference of the Book is as it is there ſaid; but the main Point was not there in Queſtion, altho' in thoſe Times there was a doubtful Opinion what the Law was; and I ſpake with Mr. *Lee* a very good Clerk, who hath attended the Seſſions at the *Old Bailey* above forty Years; and I aſked him how the Practice there was, and he told me it was doubted till about 4 & 5 *Car.* 1. And then Juſtice *Jones*, and ſeveral other Judges adviſed about it, and did reſolve that the Party who loſt the Goods and proſecuted the Felon to Conviction ſhould have Reſtitution of his Goods which were ſtolen, notwithſtanding they were ſold in a Market Overt, and ever ſince that Time he ſays the Practice hath been accordingly. And if any one plead to a Writ of Reſtitution in ſuch a Caſe, that he bought the Goods in a Market Overt; ever ſince the Reſolution the other Party preſently demurred unto it, and had Judgment: And I think it to be a very good Reſolution warranted by the Words of the *Stat.* of 21 *H.* 8. and tends to the advancement of Juſtice to make Men proſecute Felons, and it will diſcourage Perſons from buying ſtolen Goods, tho' in a Market Overt; for under that pretence Men buy Goods there for a ſmall Value of Perſons whom they have reaſon to ſuſpect, which Practice this Reſolution will abate.

Moore 360.

Vide Co. ſur Magna Charta, p. 714. accord. notwithſtanding a Sale in a Market Overt, in Caſe of an Appeal at Common Law; And *Stat.* 21 *H.*8. ſaith that Reſtitution ſhall be made in caſe the Thief be convicted at the Proſecution of him who loſt the Goods, as in the Caſe of an Appeal at Common Law.

Coke's Magna Charta is expreſs in Point, that upon the *Stat.* of 21 *H.* 8. the Owner who Proſecutes ſhall have Reſtitution, notwithſtanding a Sale in Market Overt. *Note*, If Goods be ſtolen, and not waived in flight, nor ſeized by ſome of the King's Officers, as ſuſpected to be ſtolen, there the Party that is robbed may take his Goods again, or bring an Action for them, altho' he doth not Proſecute.

Profecute. *Vide Co.* 5. *Rep. Foxley's Caſe* 109. *Stamford Pl. Caron.* 186. *b.* But if the Goods be waived by the Felon in his Flight or in Caſe they be not waived, yet if they be ſeized by any of the King's Officers as ſuſpecting them to be ſtolen, there the Party ſhall not have Reſtitution, unleſs the Thief be convicted at his Proſecution, *Vide Stamford, Pl. Cor.* 186. *b.* And in ſuch Caſes the Party ſhall have Reſtitution only for ſuch Goods as are expreſſed in the indictment, and not for any other Goods tho' ſtolen at the ſame time, if they are omitted out of the indictment, becauſe by that omiſſion the Chief might have eſcaped, *Co.* 5. *Rep. Foxley's Caſe* 110. *Vide* for theſe matters *Stamford, Pl. Cor. Title Freſh Sute*, 165. and *Title Wayfe*, 185. and *the ſame Book Title* *.

2 Hawk. 248, 249, 250, 251, 252, 467, 468.

The Queſtion, whether at this day there needs two Witneſſes to convict a man of High Treaſon, hath grown only upon the Opinion of *Co. Pl. Cor.* 25, 26. where amongſt other things, he delivers an Opinion that at the Common Law, two Witneſſes are needful in Caſes of Treaſon, and cites many Books in the Margin; but none of them warrant any ſuch Opinion; and there are many things in his Poſthumous Works, eſpecially in his Pleas of the Crown concerning Treaſons, and in his Juriſdiction of the Courts concerning Parliaments, which lie under a Suſpicion, whether they received no Alteration, they coming out in the time of that which is called the *Long Parliament*, in the time of that deſperate Rebellion againſt *King Charles* the firſt. But certain it is, there are many Errours in thoſe places; but as to the main Queſtion, it ſeemeth to me very plain by the expreſs Words of the *Stat.* of 1 *E.* 6. c. 12. that at the Common Law one Witneſs was ſufficient in High Treaſon. For the Words of the *Stat.* are, no Perſon after the firſt day of *February, then next coming, ſhould be indicted, convicted, &c. for any Offence of Treaſon, &c. Unleſs ſuch Offender be accuſed by Two ſufficient Witneſſes*, which proveth ſtrongly, as I think, that before that time one Witneſs was enough, and, in all Caſes at Common Law, Proof by one Witneſs is ſufficient, and no authority, that I can find, in any Book is otherwiſe, ſo that I take the neceſſity of two Witneſſes was induced by the *Stat.* in 1 *E.* 6. and then the Force of that Statute is taken away by the 1 & 2 *Ph. & Ma. cap.* 10. which

One Witneſs is enough in Treaſon, as it ſeemeth to me.

2 H.P.C. 287. 2 Hawk. 602, 3 contra.

*Title Appeals. St. Pl. Cor. 66, as I believe.

altho' it were in the general a Law which expired with that Queen, being made for preſervation of her Perſon, yet that Clauſe in that Statute, that Trials for Treaſons ſhall be according to the courſe of Common Law, is a perpetual Clauſe, and reſtoreth the Common Law as it was before the *Stat.* 1 of *E.* 6. and the *Stat.* 1 & 2 *Phil. & Ma. cap.* 11. which is the next Chapter concerning Treaſons, in counterfeiting Monies, ſaith, that the Offenders ſhall be indicted, convicted, and attainted by ſuch like Evidence, and in ſuch manner as they might have been before the firſt Year of the late K. *E.* 6. which points expreſly to the time when two Witneſſes were required, and which by this Statute appeared not to be at the Common Law *.

Vid. Stat. 1. *Jac. c.* 21.

That *Brokers*, as they are now uſed for taking to pawn or buying of Aparrel, Bedding, Plate, Jewels, &c. is an unlawful Trade, and enacted, that no Sale to ſuch Perſons in *London*, *Weſtminſter*, *Southwark*, or within two miles thereof, alters any property; and that if they refuſe to ſhew any ſuch Goods ſo pawned or ſold, they forfeit the double value: and ſo there is a difference betwixt the ancient *Brokers* and theſe new *Brokers*, ſo that by the Statute if any ſtolen Goods be bought by them, the party may have his Action againſt them for the Goods, whether he proſecute the Felon or not, for the property remains to the Owner, notwithſtanding ſuch ſale.

Sale to Brokers not alter the Property.

Memorandum, at *Lent* Circuit at *Wincheſter*, 18 *Car.* 2. *One Henry Hood* was indicted for the Murder of *John Newen*, and upon the Evidence it appeared, that he killed him without any provocation, and thereupon I directed the Jury, that it was Murder; for the Law in that Caſe intended malice; and I told them they were judges of the matter of fact, *viz.* whether *Newen* died by the hand of *Hood*; but whether it was Murder or Manſlaughter, that was matter in Law, in which they were to obſerve the direction of the Court. But notwithſtanding they would find it only Manſlaughter; whereupon I took the Verdict, and fined the Jury, of which *John Goldwier* was the Foreman, 5*l.* a piece, and committed them to Goal till they found Sureties to appear

Hood's Caſe. Jurors fined for finding Manſlaughter contrary to direction of the Court, See before. This courſe of fining was uſed in thoſe Days, but ſince condemned, and never ſince uſed barely for giving a Verdict contrary to Evidence.

* But this Doubt is removed by Statute 7. W. 3 C. 3. Vide Foſter 1 Diſc. on H. T. Cap. 3. p 221. 2 Ed.

† But coſt to Pawnbrokers in Great Britain. Vide 30 Geo. 2. c. 24, and 24 Geo. 3. c. 42.

appear at the next Aſſizes, and in the mean time to be of the good Behaviour: but after, upon the Petition of the Jurors, I took down their fines to 40*s.* a piece, which they all paid, and entered in Recognizance, *&c.* *

At the ſame Aſſizes at *Wincheſter*, the Clerk appointed by the Biſhop to give Clergy to the Priſoners, being to give it to an old Thief; I directed him to deal clearly with me, and not to ſay *legit* in caſe he could not read; and thereupon he delivered the Book to him, and I perceived the Priſoner never looked upon the Book at all, and yet the Biſhop's Clerk, upon the demand of *legit* or *non legit*, anſwered *legit*; and thereupon I wiſhed him to conſider, and told him I doubted he was miſtaken, and bid the Clerk of the Aſſizes aſk him again, *legit* or *non legit*, and he anſwered again ſomething angrily, *legit*: Then I bid the Clerk of the Aſſizes not to record it, and I told the Parſon he was not the Judge whether he read or not, but a Miniſterial Officer to make a true Report to the Court. And ſo I cauſed the Priſoner to be brought near, and delivered him the Book, and then the Priſoner confeſſed he could not read; whereupon I told the Parſon he had reproached his Function, and unpreached more that day than he could preach up again in many days; and becauſe it was his perſonal Offence and Miſdemeanor, I fined him 5 *Marks*, and did not fine the Biſhop, as in caſe he had failed to provide an Ordinary.

The Ordinary fined, for ſaying the Priſoner did read when he could not, for endeavouring to abuſe the Court. 2 Hawk. 506. Ante 28. 2 H. P. C. 2 Hawk. 506, 7.

My Brother *Archer*, upon diſcourſe, told me he well remembered the Caſe of *Mr. Ford, a Gent.* in *Grays Inn*, who in the time when *Sir Nich. Hyde* was Chief Juſtice, was indicted of Murder in the King's Bench, and upon the Evidence, the caſe was that *Mr. Ford* with other Company, was in the *Vine Tavern* in *Holborn*, in a Room, and ſome other Company, bringing with them ſome Women of ill Fame, would needs have the Room where *Mr. Ford* was, and turn him out, to which *Mr. Ford* anſwered, that if they had civilly deſired it, they might have had it, but he would not be turned out by force, and thereupon they drew their Swords on *Mr. Ford*, and his Company, and *Mr. Ford*, drew his Sword, killed one of them, and it was adjudged juſtifiable.

Mr. *Ford's* Caſe. Killing a Man in defence of his own Poſſeſſion of a Room in a Tavern juſtifiable. 1 Hawk. 110. 1 Hawk. 125. Prin. P. L. 225. Vide Mawgridge's Caſe. Poſt 119. Holt 484. 9 St. Tr. 61.

Memorand. To inquire of this Caſe †.

* But ſee Buſhel's Caſe. Vaughan 135, and 2 Hawk. 223.

† This Caſe continues to be doubted, whether it be Law. Vide Foſter in notis 274.

Jones' and *Bever's* Case. 1 Hawk. 163. 2 Hawk. 500. Ante 27.

At the Goal-delivery in the *Old Bailey*, 19 *February* 1665, *John Jones* and *Philip Bever*, were indicted for Burglary for breaking the King's House at *Whitehal*, and stealing from thence the Goods of the Lord Cornbury, and were found not Guilty; and after were indicted for the same Burglary, and stealing the Goods of *Mr. Nunnesy*: and we agreed that they being once acquitted for the Burglary, could not be indicted again for the same Burglary, but might be indicted for stealing the Goods of *Mr. Nunnesy* according as it was formerly resolved in *Turner's* Case. *Vide ante**. But in this case when we saw the Evidence not sufficient to prove the stealing of my Lord *Cornbury's* Goods, we might have discharged the *Jury* and so taken no Verdict; and then he might have been indicted for that Burglary, and stealing the Goods of *Mr. Nunnesy*.

2 Hawk. 527. 2 H.P.C. 295. Ante 26, and 47. And References ibid.

Fost. contra, 30.

Burglary, Country House and City House. 1 Hawk. 162.

Memorandum, *Mr. Lee*, the Clerk of the Peace for *London*, then told me, that about twenty Years since in the Case of *Mr. Gardiner*, who was a Citizen, and had a House in the City where he usually lived in the Winter, and another House in the Country where he usually lived in Summer; and while he and his Family were in the Country, his house in the City was broken open in the Night, and his Goods stolen; no Person being in the House, and it was adjudged Burglary, for it was his Mansion House.

Memorandum, That my Brother *Twisden* shewed me a Report which he had of a Charge given by Justice *Jones* to the Grand Jury at the King's-Bench-Barr in *Michaelmas Term*, 9 *Car.* 1. In which he said, that Poisoning another was Murder at Common Law. And the Statute of 1 *E.* 6†. was but declaratory of the Common Law, and an Affirmation of it. He cited *Vaux* and *Ridley's* Case. If one drinks Poison by the Provocation or Persuasion of another, and dieth of it, this is Murder in the Person that persuaded it. And he took this difference: if *A.* give Poison to *J. S.* to give to *J. D.* and *J. S.* knowing it to be Poison, give it to *J. D.* who taketh it in the absence of *J. S.* and dieth of it. In this Case *J. S.* who gave it to *J. D.* is Principal. And *A.* who gave the Poison to *J. S.* and was absent when it was taken, is but accessary before the Fact: But

Fost. 68.

2 Hawk. 52, 53.

Principals in Murder, tho' absent. Fost. 349.

* Page 30.

† See an Account of the Reasons of this Act. Fost. 68, 69, 70, 71.

But if *A.* buyeth Poiſon for *J. S.* and *J. S.* in the abſence of *A.* taketh it, and dieth of it; in this caſe *A.* though he be abſent, yet he is Principal: ſo it is if *A.* giveth Poiſon to *B.* to give unto *C.* and *B.* not knowing it to be Poiſon, but believing it to be a good Medicine, giveth it to *C.* who dieth of it; in this caſe *A.* who is abſent is Principal, or elſe a Man ſhould be murdered and there ſhould be no Principal: for *B.* who knew nothing of the Poiſon, is in no fault, tho' he gave it to *C.* So if *A.* puts a Sword into the hand of a Mad Man, and bids him kill *B.* with it, and then *A.* goeth away, and the Mad Man kills *B.* with the Sword as *A.* commanded him, this is Murder in *A.* tho' abſent, and he is Principal: for it is no Crime in the Mad Man who did the Fact, by reaſon of his Madneſs, and he ſaid that this Caſe was lately before himſelf and Baron *Trevor* at the Aſſizes at *Hereford.* A Woman after ſhe had two Daughters by her Huſband Eloped from him and lived with another Man. And afterwards one of her Daughters came to her, and ſhe aſked her how doth your Father, to which her Daughter anſwered, that he had a Cold, to which his Wife replied, here is a good Powder for him, give it to him in his Poſſet; and on this the Daughter carried home the Powder, and told all this that her Mother had ſaid to her, and to her other Siſter, who in her abſence gave the Powder to her Father in his Poſſet, of which he died. And he ſaid, that upon Conference with all the Judges, it was reſolved that the Wife was Principal in the Murder, and alſo the Man with whom ſhe run away, he being proved to be adviſing in the Poiſon; but the two Daughters were in no Fault, they both being ignorant of the Poiſon, and accordingly the Man was Hang'd, and the Mother Burnt.

2 Hawk. 443. Perſon abſent Principal in Murder, where the Perſon who did the Fact is not guilty, becauſe of Madneſs. 1 Hawk. 3. Dalt. 533. 1 H.P.C. 617.

Perſons abſent Principal in Murder. 2 Hawk. 443. Poſt 349.

Memorandum, that upon Saturday the 28 *of April* 1666 *An.* 18 *Car.* 2. All the Judges of *England*, *viz.* Myſelf, *J. K.* Lord Chief Juſtice of the King's Bench; *Sir Or. Bridgeman*, Lord Chief Juſtice of the Common Pleas, *Sir Matthew Hales*, Chief Baron of the Exchequer, my Brother *Atkins*, Brother *Twiſden*, Brother *Tyrell*, Brother *Turner*, Brother *Browne*, Brother *Windham*, Brother *Archer*, Brother *Raynsford*, and Brother *Morton*, met together at *Serjeant's Inn* in *Fleet-ſtreet*, to conſider of S. C.

Reſolution of all the Judges, on Occaſion of the Trial of Lord *Morely*. 2 Hawk. 598. 1 Lev. 180. 1 Sid. 277. 1 Keb. 896. 2 Keb. 19. 7 St. Tr. 421.

of such things as might in point of Law, fall out in the Trial of the Lord *Morly*, who was on Monday to be tryed by his Peers for a Murder, and we did all *una voce* resolve several things following, *part* 1. First it was agreed that upon the Letter of the Lord High Steward directed to us, we were to attend at the Tryal in our Scarlet Robes, and the Chief Judges in their Collars of *SS.* which I did accordingly; but my Lord *Bridgman* was absent, being suddenly taken with the Gout, the Chief Baron had not his Collar of *SS.* having left it behind him in the Country; but we all were in Scarlet, but no body then had a Collar of *SS.* but myself, for the Reasons aforesaid.

Vide Moor's Rep. 621. resolved by all the Judges, that on a Tryal by Peers the Prisoner can not challenge any of the Peers that are returned on his Jury.

Habit of the Judges at the Tryal.

2. It was resolved, that in case the Peers who are Tryers after the Evidence given, and the Prisoner withdrawn, and they gone to consult of their Verdict, should desire to speak with any of the Judges to have their Opinion upon any point of Law, that if the Lord Steward spoke to us to go, we should go to them; but when the Lords asked us any Question, we should not deliver any Opinion, but let them know we were not to deliver any private Opinion without conference with the rest of the Judges, and that to be done openly in Court: and this, notwithstanding the President in the Case of the Earl of *Castlehaven* *, was thought prudent in regard of ourselves, as well as for the avoiding Suspicion, which might grow by private Opinions, all Resolutions of Judges being always done in Publick.

If Advice asked in private of the Judges by the Peers.

3. Although we were not all agreed in the President of the Lord *Dacre's* Case, cited by *Sir E. Coke* in the Pleas of the Crown, *p.* 29, & 30. that the Judges may deliver any Opinion in open Court, in the absence of the Prisoner; yet it was agreed, that if the Lord Steward should, in open Court, demand any of our Opinions in any thing, tho' in the absence of the Prisoner, we were to give an Answer to the Question the Lord High Steward should demand of us, we being call'd to assist the Court, and the demand of any Question in such case being referred to the Discretion of the High Steward.

If asked in Court by the High Steward in absence of Prisoner.

4. It

* I cannot after my best research find this Case.

4. It was resolved by us all, that in case any of the Witnesses which were examined before the Coroner, were dead or unable to Travel, and Oath made thereof, that then the examinations of such Witnesses, so dead or unable to Travel might be read, the Coroner first making Oath that such Examinations are the same which he took upon Oath, without any Addition or Alteration whatsoever.

Witnesses examined by the Coroner, dead or not able to Travel. 2 Hawk. 605. Sum. 262, 263.

5. That in case Oath should be made that any Witness who had been examined by the Coroner, and was then absent, was detained by the means or procurement of the Prisoner, and the Opinion of the Judges asked whether such Examination might be read, we should answer, that if their Lordships were satisfied by the Evidence they had heard, that the Witness was detained by means or procurement of the Prisoner, then the Examination might be read, but whether he was detained by the Means of Procurement of the Prisoner, was matter of Fact, of which we were not Judges, but their Lordships.

Witnesses detained by procurement of Prisoner. 2 Hawk. 605. 2 Keb. 19.

6. Agreed, that if a Witness who was examined by the Coroner be absent, and Oath is made that they have used all their Endeavours to find him and cannot find him, that is not sufficient to authorize the reading of such Examination.

Witness sought for and not found. 2 Hawk. 605.

7. Agreed, that no words, be they what they will, are in Law such a Provocation, as if a Man kill another for words only will diminish the Offence of killing a Man from Murder to be Manslaughter: as suppose one call another son of a Whore, or give him the Lie, and thereupon he to whom the words are given, kill the other, this is Murder. But if upon ill words, both the Parties suddainly Fight, and one kill the other, this is but Manslaughter, for it is a combat betwixt two upon a suddain heat, which is the legal description of Manslaughter; and we were all of Opinion that the Statute of 1 *Jac.* for Stabbing a Man not having first struck, nor having any Weapon drawn, was only a Declaration of the Common Law, and made to prevent the inconveniencies of Juries, who were apt to believe that to be a Provocation to extenuate a Murder, which in Law was not.

Words only, no Provocation to lessen the Offence of killing a Man from Murder to be Manslaughter. 1 Hawk. 123. 1 Hawk. 124. 1 H.P.C. 456. Fost. 290. *Vide Crompton's Just.* 23. *a, b.* Two to play at Tables and fall out suddainly, and one with a Dagger kill the other. 1 Hawk. 116. Fost. 298.

Agreed,

If there be a Quarrel, and a reasonable Time before they Fight, it is Murder. 1 Hawk. 122, 123. *V. Crompt. Just.* 23. Two fall out suddainly and Fight presently, and one kill the other it is but Manslaughter; so if after they have quarrelled, they presently go into the Field and Fight, and one kills the other, 'tis but Manslaughter; For all is one continued Act of Fury But if two fall out suddainly, and before any blows presently appoint to go to the Field and Fight, and one kill the other, this is Murder, because it appeareth by choosing a fit place to fight, their Reason was above their Passion, and so a deliberate Act. *Vide Crompt. Just. p.* 25. acordant.

8. Agreed, that if upon words two Men grow to Anger, and afterwards they suppress that Anger, and then fall into other Discourses, or have other Diversions for such a space of time as in reasonable intendment, their heat might be cooled, and some time after they draw one upon another, and Fight, and one is killed, this is Murder, because being attended with such Circumstances as it is reasonably supposed to be a deliberate Act, and a premeditated Revenge upon the first Quarrel; but the Circumstances of such an Act being matter of Fact, the Jury are Judges of those Circumstances.

This following Report I took out of Justice Spelman's *Original Reports, which I had from* Sir Jeffry Palmer *Attorney General, which Report is cited, Co. Pl. Cor.* 29 & 30.

11 St. Tr. 10. 2 Hawk. 6.

The Lord *Dacres*'s Case, who was indicted for Treason before Commissioners of *Oyer* and *Terminer* in the County of *Cumberland*, for adhering to the Scots, the King's Enemies, and tried by his Peers 26 *H.* 8.* *Thomas Duke* of *Norfolk* being High Steward; and the day before all the Judges assembled to resolve certain Questions which might arise upon the said Tryal, so that if any Question should be asked them they might resolve *una voce*, and one Question was, whether the Prisoner might waive his Tryal by his Peers, and be tryed by the Country, and they all agreed he could not. For the Statute of *Magna Charta* is in the Negative, *Nec super eum ibimus nisi per legale judicium parium sucrum*, this is at the King's Suit upon an indictment.

*A Peer cannot waive his Tryal by Peers.

2 Hawk. 597.

Verdict of the greatest number, good if twelve. Fost. 247.

2. It was agreed by most of the Judges, that if all the Peers do not agree in their Verdict, then the Verdict of the greatest part of them is a good Verdict, so that there be Twelve or more; (therefore the use is never to have less than twenty three Peers for *Tryers*, because that is the least number to be sure of twelve to be of one Mind) And after the Prisoner was arraigned, and askt whether

he

he was Guilty or not Guilty: he desired respit to consider, because the indictment was long, and contained many things; but the High Steward told him, he must plead to the Treason, or else Judgment would be given against him as a Traitor, and thereupon he pleaded not Guilty. When he was asked how he would be tryed, and he took long time to consider, and would not have put himself upon his Peers; but at last the High Steward told him that he must give Judgment against him as a Traitor, unless he put himself upon his Peers, as against one who refused the Tryal of Law; and thereupon he put himself for his Tryal upon his Peers; and after Evidence was given, and the Prisoner withdrawn from the Bar, and the Lords gone to consider of their Verdict, they sent to the Lord Steward to speak with him; and he thereupon desired the advice of the Judges; and they advised him that he could not do so unless the Prisoner was present at the Bar. And afterwards the Peers desired the Lord Steward that one *Christopher Dacres*, Uncle to the Lord *Dacres*, who was in the *Tower* for the same Treason, might be sent for to be examined, if the *L. Dacres* did command him to go to the Lord *Maxie* to treat with him in favour of the *Scots*: and the Lord *Steward*, by the advice of the Judges, told them, that could not be done, all the Evidence being given already, and also he was not a necessary Witness, being Uncle to the Prisoner, and not supposed that he would give Evidence against him, so after, in the absence of the Prisoner (as the Course is) the Lords gave the Verdict, and found him not Guilty, and then the Prisoner was brought to the Bar, and the Lord *Steward* did rehearse the Verdict, and gave Judgment that he should be discharged paying his Fees.

2 Hawk. 464. Sum. 226. 2 H. P. C 317. Skinner 145. Savile 56. Dyer 205. 1 Inst. 177. Co. Lit. 391. 3 Inst. 14, 30. S. P. C. 150. 2 Hawk. 597.

The High Steward not to speak to the Peers in the Absence of the Prisoner. 2 Hawk. 597. 3 Inst. 22, 36. 2 Inst. 49.

And amongst the Judges, a Question was moved whether the Court might be adjourned to the next day, and they agreed it might, but it hath not been done.

Court may be adjourned. 2 Hawk. 24.

Another Question was moved among them, that if the Peers did not agree, so that the Court was adjourned till the next day, what should be done with the Peers who were the Tryers? And some Judges held they were to be kept together all night, but others held, because they were not sworn, for the great Trust reposed in them, and presumed to be in them, they might go to their own Houses every one by himself.

If the Lords agree of their Verdict that Day whether to be kept together, or go to their several Houses. 2 Hawk. 598. And Cases ibi.

Lords before whom the Indictment is found, may be Peers on the Tryal.

Another Queſtion was moved among them, whether the Lords who were Commiſſioners, to enquire of the Treaſon, before whom the Priſoner was indicted upon the Commiſſion of *Oyer* and *Terminer*, might be Peers on the Tryal; and agreed by all that they might.

1 Hawk. 113, 123.

If *A.* hath Malice againſt *B.* and meeteth him and ſtriketh him, and then *B.* draweth at *A.* and flyeth back until he come to a Wall, and then kills *B.* this is Murder, notwithſtanding his flying to the Wall; for the craft of flying ſhall not excuſe the Malice which he had, nor ſhall any ſuch Device to wreak his Malice on another, and think to be excuſed by Law, avail him any thing, but in ſuch Caſe the Malice is enquirable, and if that be found by the Jury, then his flight is ſo far from excuſing the Crime, that it aggravates it, *vide Cromp Juſt.* 22. *b. Fitz Cor.* 287. *vide at the end of that Caſe, in Fitz Abridgment, Coron.* 287. the Jurors were amerced for putting an under Value upon the Goods of a man who killed another in his own defence. *

Murder notwithſtanding flying to a Wall. Foſt. 278.

Jury undervalue Goods forfeited they are amerceable.

At a Goal Delivery at *Newgate*, 11*th July* 18 *Car.* 2. *Tho. Johnſon, John Girling*, and *Elizabeth Powell* were indicted for breaking the Houſe of *Thomas Powell* (his Wife then being in the houſe) and ſtealing away above 60 *l.* in Money. Upon the Evidence the Caſe was, that *Powell* kept an *Ale-houſe*, and *Eliz. Powell* was his Servant, and had ſeen her Miſtreſs put Money into a Trunk in her *Chamber*, which was 2 pair of Stairs high and locked her Trunk; and this Servant combined with the two Men to Rob her of the Money, and in order thereunto, thoſe two Men came into the Houſe to Drink, and found fault with all the Rooms below Stairs, and ſo were had up two pair of Stairs, the next Chamber to that where the Money was, and the Maid came to them, and they broke up the Trunk, and took away above 60 *l.* in Money, and upon this Evidence, myſelf, and my Brother *Twiſden*, and Brother *Wylde* being preſent, were of Opinion that to take away Clergy, there muſt be an actual breaking of the Houſe. For if one come into a

Johnſon, Girling, and *Powell*'s Caſe.

* As this is cited, it might be imagined that in every Caſe of Homicide, *ſe defendendo*, a Man forfeited all his Goods, otherwiſe, why was the Jury charged with the Value of them, or amerced for their Miſbehaviour, with regard to the Appraiſment? But Fitzherbert goeth farther into the true State of the Caſe: The Defendant after he killed the Aſſailant fled for it. Ideo ſaith the Book, Catalla ejus confiscantur profuga. See Foſter C. L. 286.

Tavern

Tavern, or an *Ale-houſe*, and take any thing, the Law maketh them Treſpaſſers *ab initio*; and ſo if they ſteal any thing, it is Felony; yet this doth not make an actual breaking of the Houſe; but in that Caſe, if they being in the Houſe break open any Chamber-door and ſteal Goods, this is an actual breaking of the Houſe, and taketh away Clergy; but the breaking open a Trunk or Box which is locked, and ſtealing any thing out of it, is no actual breaking of the Houſe, becauſe the Trunk or Box are no part of the Houſe. But if they break open any thing which is fixed to the Free-hold, as a Cupboard Door in a Wall, *&c.* this is an actual breaking of the Houſe; and accordingly in the principal Caſe, the Men had there Clergy.

What ſhall be a breaking of a Houſe to take away Clergy. 2 Hawk. 497. Vide Foſt. 108, 109.

At a Goal-delivery at Newgate, 25 *April*, 1666. 18 *Car.* 2. upon an indictment of Murder againſt *Hopkin Huggett*, a ſpecial Verdict was found to this Effect. We find that *John Berry*, and two others with him the Day and Place in the Inquiſition had *de facto*, but without Warrant (for ought appears to us) impreſſed a Man whoſe Name is not yet known, to ſerve in his Majeſties Service in the wars againſt the *Dutch Nation*; that thereupon, after the unknown man was impreſſed, he with the ſaid *John Berry*, went together quietly into *Cloth-fair*; and the ſaid *Hopkin Huggett* and three others, walking together in the *Rounds* in *Smithfield*, and ſeeing the ſaid *Berry* and two others with the man impreſſed, going into *Cloth-fair*, inſtantly purſued after them, and overtaking *Berry* and the impreſt man, and the two other Men required to ſee their Warrant, and *Berry* ſhewed them a Paper which *Hopkin Huggett* and the 3 others ſaid was no Warrant; and immediately the ſaid *H. Huggett* and the three others drew their Swords to reſcue the ſaid man Impreſt, and did thruſt at the ſaid *John Berry*; and thereupon the ſaid *John Berry* and the two others with him did draw their Swords and fight together, and thereupon the ſaid *H. Huggett* did give the Wound in the Inquiſition to the ſaid *John Berry*, whereof he inſtantly died; and if upon the whole matter, the ſaid *H. Huggett* be guilty of Murder they find ſo; If of Manſlaughter they find ſo, &c. All the Judges of *England* being met together, at *Serjeant's-Inn* in *Fleet-ſtreet*, upon other Occaſions, (and before that time, having Copies of this

Hopkin Huggett's Caſe for killing a Man 1 Lord Raym. 143. 1 H. P. C. 46. Foſt. 138, 154. 314.

Judges differ, if Murder or Manſlaughter.

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special Verdict sent unto them) after the other business dispatched, they were desired to give their Opinions in this Case, whether they held it to be Murder or Manslaughter. And the Lord Chief Justice *Bridgman*, Lord Chief Baron *Hales*, my Brother *Atkins*, Brother *Tyrell*, Brother *Turner*, Brother *Browne*, Brother *Archer*, and Brother *Rainsford*, having had the Notes of the Special Verdict three days before, delivered their Opinion as then advised; but they said they would not be bound by it: that this was no Murder, but only Manslaughter; and they said, that if a man be unduly arrested or restrained of his Liberty by three men, altho' he be quiet himself, and do not endeavour any Rescue, yet this is a Provocation to all other men of *England*, not only his Friends but Strangers also for common Humanity sake, as my Lord *Bridgman* said, to endeavour his Rescue; and if in such endeavour of Rescue they kill any one, this is not Murder, but only Manslaughter. And my Brother *Browne* seemed to rely on a Case in *Coke* 12. *Rep. p.* 87. where divers men were playing at Bowls, and two of them fell out and quarrelled, one with another, and a third man who had no Quarrel, in revenge of his Friend struck the other with a Bowl, of which blow he died, this was held to be only Manslaughter. But myself, Brother *Twisden*, Brother *Wyndham*, and Brother *Morton*, were of another Opinion; and we held it to be a Murder, because there was (as we thought) no provocation at all. And if one man assault another without Provocation, and kill him, this is Murder; the Law in that Case implying Malice. And we find it was resolved by all the Judges in the Lord *Morley*'s *Case*, that no Words, be they what they will, were such a Provocation in Law, as if upon them one kills another would diminish or lessen the Offence from being Murder, to be but Manslaughter. As if one called another Son of a Whore, and giveth him the Lie, and upon those Words the other kill him that gave the Words, this notwithstanding those Words, is Murder; and we thought those Words were apter to provoke a man to kill another, than the bare seeing a man to be unduly pressed when the Party pressed willingly renders himself. But we held that

1 Hawk. 129 *. Cromp. 27. Lord Raym. 1296. Holt. 495.

Vide Lord *Morly*'s Case. Ante 55 *.

* The Principles on which this Case was ruled, are controverted by Mr. J. Foster, 315 to 318.

such

such a provocation as must take off the killing of a man from Murder to be but Manslaughter, must be some open Violence, or actual striving with, or striking one another; and that answers the Case cited by my Brother *Browne*. For there it must be intended that the two men that fell out were actually fighting together; for if there passed only Words betwixt these Two, and upon them, a third Person struck one of them with a Bowl, and killed him, we held that to be Murder. And to this my Lord *Bridgman* and the other Judges agreed, and we thought the Case in question to be much the stronger, because the Party himself who was impressed was quiet, and made no Resistance, and they who medled were no Friends of his, or Acquaintance, but were Strangers, and did not so much as desire them which had him in Custody to let him go, but presently without more ado, drew their Swords at them, and ran at them. And we thought it to be of dangerous Consequence to give any Encouragement to private men to take upon themselves to be the Assertors of other Men's Liberties, and to become Patrons to rescue them from Wrong; especially in a Nation where good Laws are for the Punishment of all such Injuries, and one great end of Law is to right Men by peaceable Means, and to discountenance all Endeavours to right themselves, much less other Men by Force.

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Secondly, We four were of Opinion, that if *A.* assault *B.* without any Provocation, and draw his Sword at him, and run at him; and then *B.* to defend himself draw his Sword, and they fight together: If *A.* kill *B.* it is Murder, and *B.* drawing his Sword to defend himself shall not lessen the Offence of *A.* from being Murder, to be Manslaughter only: And to this the other Judges did (as I take it) agree. For it were unreasonable, that if one Man draw upon another, and run at him without any Provocation that the other Man should stand still, and not defend himself, and it is also unreasonable that his endeavour to defend himself should lessen the Offence of him who set upon him without Provocation.

1 Hawk. 123. Fost. 295. Lord Raym. 1493. 2 Roll. 461.

But we four held, that if two men be quarrelling, and actually fighting together, and another Man runneth in to aid one of them and kill the other, this is but Manslaughter, because there was an actual fighting and striving with violence.

1 Hawk. 123

So

So we held, If such People who are called Spirits take up a Youth, or other Person to carry him away, and thereupon there is a Tumult raised, and several Persons run in, and there is a Man killed in the Fray, this is but Manslaughter: For there is an open Affray, and actual Force, which is a suddain Provocation, and so that Death which ensueth is but Manslaughter. But where People are at Peace, there if another Man upon Suspicion that an Injury is done to one of them, will assault and kill him whom he thinketh did the Injury, this is Murder, so that we hold nothing but an open Affray or striving can be a Provocation to any Person to meddle with an Injury done to another, if in that medling he kill a Man, to diminish or lessen the Offence from Murder to Manslaughter.

Memorandum, After this Difference I granted a *Certiorari* to remove the Cause into the King's Bench, to be argued there, and to receive a final and legal Determination; and altho' all the Judges of the Court were clearly of Opinion that it was Murder, yet it being in Case of Life, we did not think it prudent to give him Judgment of Death, but admitted him to his Clergy; and after he read, and was burned in the Hand, we ordered him to lie in Prison eleven Months without Bail, and afterwards until he found Sureties to be of the good Behaviour during his Life.

Cossy and *Cotter*'s Case.

Robbery and Burglary by Fraud. 1 H. P.C. 552.

At the Goal-Delivery in the *Old Baily*, 10 *Oct.* 1666. *Tho. Cassy*, and *John Cotter*, were indicted for robbing *William Pinkney*, a Goldsmith by the *Templebar*, in his House near the High-way in the Night Time, and stealing several parcels of Plate, and other Things from him. And they were also indicted for the same Offence for Burglary for breaking his House in the Night, and stealing his Plate, &c. and on both these Indictments they were arraigned and tryed, and upon the Evidence the Case appeared to be that *Cotter* was a Lodger in the House of the said *Pinkney*, and knowing that he had Plate and Money to a good Value, he combined with the aforesaid *Cassy*, and one *John Harrington*, and *Gerrard Cleashard*, and

Vide Cok. Pl. Cor. 64. pretence of Hue and Cry.

and they three contrived that one of those three should come as Servant of the other to hire Lodgings there, for his Master and another Gentleman; and *Cotter* told them, that *Pinkney* was one who constantly kept Prayers every Night, and they could not have so good an Opportunity to surprize him as to desire to join in Prayer with him, and at that time to fall on him and his Maid, there being then no other Company in the House; and accordingly one of them came on *Saturday* in the Afternoon, and hired Lodgings there, pretending it to be for his Master and another Gentleman of good Quality, and about eight o'Clock at night, they all came thither, two of them being in very good Habit, and when they were in their Chamber they sent for Ale, and desired *Pinkney* to drink with them, which he did; and while they were drinking, *Cotter* came in to his Lodging, and they hearing one go up Stairs, asked who it was, and *Pinkney* told them it was an honest Gentleman, one Mr. *Cotter*, who lodged in his House, and they desired to be acquainted with him, and that he might be desired to come to them; and thereupon *Pinkney* sent his Maid to him to let him know the Gentlemen desired to be acquainted with him, to which *Cotter* sent word it was late, the next day was the Sabbath, and he desired to be private, and thereupon those Persons told *Pinkney* they had heard he was a Religious Man, and used to perform Family Duties, in which they desired to join with him. At which *Pinkney* was very well pleased that he had got such Religious Persons, and so called to Prayers, and while he was at his Devotion they rose up, and bound him and his Servant, and then *Cotter* came to them, and shewed them where his Money and Plate lay, and they ransacked the House, and broke open several Doors and Cupboards fixed to the House, and upon this Evidence, myself, my Brother *Wylde*, Recorder, and Mr. *Howell*, Deputy Recorder, being all who were there present of the Long Robe, were of Opinion that the Entrance into his House being gained by Fraud, with an intent to rob, and they making use of this Entrance, thus fraudulently obtained as in the Night Time to break open Doors, *&c.* this was Burglary, agreeable to the Case of *Farr* in this Book, and the Case of Mr. *Lemott*, in this Book, and accordingly they were found guilty, and had Judgment, and were executed.

1 Hawk. 161. And Cases cited, ibid.

Ante 43. Ante 42.

At

Grey's Case for killing his Apprentice. Post. 133. 1 H. P. C. 454, 474. Post. 262.

At the same Sessions *John Grey* being indicted for the Murder of *William Golding*, the Jury found a special Verdict to this Effect, *viz.* We find that the Day, Year, and Place in the Indictment mentioned, *John Grey*, the Prisoner was a *Blacksmith*, and that *William Golding*, the Person killed was his Servant, and that *Grey*, his Master, commanded him to mend certain Stamps, being Part belonging to his Trade, which he neglected to do; and the said *Grey*, his Master, after coming in asked him the said *Golding*, why he had not done it, and the said *Grey* told the said *Golding*, that if he would not serve him, he should serve in *Bridewel*, to which the said *Golding* replied, that he had as good serve in *Bridewel* as serve the said *Grey* his Master; whereupon the said *Grey*, without any other Provocation, struck the said *Golding* with a Bar of Iron, which the said *Grey* then had in his Hand, upon which he and *Golding* were working at the *Anvil*, and with the said blow he broke his Skull, of which he died; and if this be Murder, *&c.* This Case was found specially by the Desire of my Brother *Wylde*, and I shewed the special Verdict to all my Brethren, Judges of the King's Bench, and to my Lord *Bridgman* Chief Justice of the Common Pleas. And we were all of Opinion that this was Murder. For if a Father, Master, or Schoolmaster, will correct his Child, Servant, or Scholar, they must do it with such Things as are fit for Correction, and not with such Instruments as may probably kill them. For otherwise, under pretence of Correction, a Parent might kill his Child, or a Master his Servant, or a Schoolmaster his Scholar, and a Bar of Iron is no Instrument for Correction. It is all one as if he had run him through with a Sword; and my Brother *Morton* said he remembered a Case at *Oxford* Assizes before Justice *Jones*, then Judge of Assize, where a *Smith* being chiding with his Servant, upon some cross Answer given by his Servant, he having a piece of hot Iron in his Hand, run it into his Servants Belly, and it was judged Murder, and the Party executed. And my Lord *Bridgman* said, that in his Circuit there was a Woman indicted for murdering her

Vide Dalton Just 218. a case cited before Justice *Walmsley*, 43 El. At *Stafford* Assizes, where on Words 'twixt Husband and Wife, he suddainly struck her with a Pestle and killed her, and it was adjudged Murder; yet a Husband by Law may correct, but the Pestle was not an Instrument to correct withal *. 1 H. P. C. 457. Crompt. 120. 2.

* There are various Editions of Dalton, and the Paging differs in most, this is Chap. 93. and here Dalton puts a Quære to this Case, cited in the Margin by the learned Editor, "Why it should be Murder, considering there appeareth no precedent Malice, "and that it was done upon the sudden and upon Provocation?" But Dalton does not seem in this Quære to have well understood the true legal meaning of the Word *Malice*, which is well defended by Foster 256, 257.

Child,

Child, and it appeared upon the Evidence, that ſhe kicked her and ſtamped upon her Belly, and he judged it Murder: And my Brother *Twiſden* ſaid, he ruled ſuch a Caſe formerly in *Glouceſter* Circuit, for a piece of Iron or a Sword, or a great Cudgel, with which a Man probably may be ſlain, are not Inſtruments of Correction. And therefore when a Maſter ſtrikes his Servant willingly with ſuch Things as thoſe are, if Death enſue, the Law ſhall judge it Malice prepenſed, and therefore the Statute of 5 *H.* 4. *c.* 5. which enacts, that if any one does cut out the Tongue, or put out the Eyes of any of the King's Subjects of Malice prepenſed, it ſhall be Felony. If a Man do cut out the Tongue of another Man voluntarily, the Law judgeth it of *Malice prepenſed*. And ſo where one Man killeth another without any Provocation, the Law judgeth it Malice prepenſed; and in the Lord *Morley*'s Caſe in this Book, it was reſolved by all the Judges, that Words are no Provocation to leſſen the Offence from being Murder, if one Man kill another upon ill Words given to him. But if a Parent, Maſter, or Schoolmaſter, correct his Child, Servant, or Scholar, with ſuch Things as are uſual and fit for Correction, and they happen to die, *Poulton de pace*, *page* 120. ſaith this is by Miſadventure, and cites for Authority, *Kelloway* 108, *a*, *b*, & 136, *a*. But that Book which puts this Caſe in *Kelloway* is 136, *a*. ſaith, that if a Man correct his Servant, or Lord his Villain, and by force of that Correction he dieth, although he did not intend to kill him, yet this is Felony, becauſe they ought to govern themſelves in their Correction in ſuch Ways that ſuch a Miſadventure might not happen. And I ſuppoſe, becauſe the Word Miſadventure is there uſed, therefore *Poulton* concludeth (it may be truly) that it is but Miſadventure.

Vide Coke Pl. Cor. in his Chapter for cutting out Tongues.

Antè 55.

It is but Miſadventure in this Caſe if death enſue upon Correction, if it be with ſuch Things as are uſual to correct withal.

Vide Dalton's Juſtice of Peace, laſt Edition 285. Books cited to this Purpoſe. H. P. C. 12.

And in this Principal Caſe, upon Certificate, many Perſons of good Commendation of the general eſteem that *Grey* had, I did certifie the King, that though in ſtrictneſs of Law, his Offence was Murder; yet it was attended with ſuch Circumſtances as might render the Perſon an Object of his Majeſty's Grace and Pardon, he having a very good Report among all his own Company of his own Trade, and of all his Neighbours, and upon this the King was pleaſed to grant him his Pardon.

1 Hawk. 111. 1 H. P. C. 454, 473, 474. 2 Mod. 287. Foſt. 262. Cowp. 262.

Tomſon's Caſe. 1 Hawk. 127, 128 in notis. 8 Mod. 164. 12 Mod. 629. But vide 12 Mod. 256.

At the Seſſions in the *Old Bailey* holden after *Hilary Term*, *Caroli Secundi*, *Thomas Tomſon* was indicted for murdering of *Allen Dawes*, and the Jury found a ſpecial Verdict to this Effect, *viz.* that the Day, Year, and Place in the Indictment mentioned, *Thomas Tomſon* the Priſoner and his Wife, were fighting in the Houſe of the ſaid *Allen Dawes*, who was killed, and the ſaid *Allen Dawes* ſeeing them fightiug, came in and endeavoured to part them, and thereupon the ſaid *Tomſon* thruſt away the ſaid *Dawes*, and threw him down upon a piece of Iron, which was a Bar in a Chimney, which kept up the Fire, and by that one of the Ribs of the ſaid *Dawes* was broken, of which he died; and if the Court judge this Murder, they find ſo, or if Manſlaughter, then they find ſo.

One ſlain in endeavouring to part two fighting where it is Murder.

1 Hawk. 128. Foſt. 310.

And I put this Caſe to my Lord Chief Juſtice Baron *Hales* and my Brother, and ſome other of my Brethren, and we all agreed as it is reſolved in *Young*'s Caſe, *Co.* 4. Report, and alſo in *Mackally*'s Caſe, *Co.* 9. Report, that if upon a ſuddain Affray, a Conſtable or Watchman or any that come in aid of them, who endeavour to part them, are killed, this is Murder; and we hold likewiſe, that if no Conſtable or Watchman be there, if any other Perſon come to part them, and he be killed, this is Murder: For every one in ſuch Caſe is bound to aid and preſerve the King's Peace. But in all thoſe Caſes it is neceſſary that the Party who was fighting and killed him that came to part them, did know or had Notice given, that they came for that Purpoſe. As for the Conſtable or other Perſon who cometh to part them, to charge them in the King's Name to keep the King's Peace, by which they have Notice of their Intents; for otherwiſe if two are fighting, and a Stranger runs in with Intent to part them, yet the Party who is fighting, may think he cometh in Aid of the other with whom he is fighting, unleſs ſome ſuch Notice be given as aforeſaid, that he was a Conſtable, and came to part them: And that appeareth by *Mackally's* Caſe before cited, where in caſe of an Arreſt by a Serjeant, it is neceſſary to make it Murder that the Serjeant tell him that he doth Arreſt, for elſe if he doth ſay nothing, but fall upon the Man and be killed by him, this

Vide Lambert Fitzherbert Fol. 262. *Dyer* 128. 1 Hawk. 127, 8. 1 Hawk. 127. Foſt. 272.

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is but Manslaughter, unless it appear that the Person arrested did know him to be a Serjeant, and that he came to arrest him; for as the Case is there put, if one seeing the Sheriff or a Serjeant whom he knoweth hath a Warrant to arrest him, and to prevent it before the Officer come so near as to let him know he doth arrest him, he Shoots again at him, and kills him, this is Murder; and in the principal Case though the Jury find that *Dawes* came to part the Man and Wife, yet it doth not appear whether it is found that *Tomson* knew his Intent, nor that *Dawes* spake any Words whereby he might understand his Intention, as charging them to keep the King's Peace, &c. And so we held it to be only Manslaughter, which in Law is properly chance-medley, that is where one Man upon a suddain Occasion kills another with Malice in Fact, or Malice implied by Law. 1 Hawk. 128. 8 Mod. 164. Fost. 275.

If a Person in the Night Time break a House, and steal Goods, this is Burglary, though no Person be at that Time in the House. So if a Man hath two Houses, one in the City and another in the Country, and while he is in the one House the other is broken open, no body being in it, and Goods stolen, this is Burglary, *Popham's Reports* 42 and 512 by all the Judges. Burglary, tho' no Person be in the House. 1 Hawk. 160. Ante 52.

A Servant in the House lodging in a Room remote from his Master in the Night Time, draweth the Latch of a Door to come into his Master's Chamber, with an intent to kill him, this on a special Verdict agreed by all the Judges to be Burglary. Burglary by a Servant in his Masters House, drawing a Latch of a Door is actual breaking an House. 1 Hawk. 160, 161, 162.

Note, That in *Popham*'s Report's 84. In one *Baynes*'s Case, it is said, that the said *Baynes* with another coming in the Night Time to a Tavern to drink, the said *Baynes* stole a Cup in which they drank out, of a Chamber in the said House, his Wife and Servant being in the said House, for which he was indicted and found guilty; and it is there reported, that by the Opinion of *Anderson*, *Popham*, and *Periam*, and the then Recorder and Serjeant at Law there present, it was agreed that this was no Burglary; which certainly is good Law, because there was no actual breaking of the House, which is of necessity to make a To make a Robbery of a House within the Stat. 23 *H.* 8. *cap.* & 5 *E.* 6. *c.* 9. take any Clergy away, there must either be an actual breaking of the House, or such a violence to some Person there

that they are put in fear or dread. *Vide* my Reasons for it in this which I hold the last Resolution in *Baynes*'s Case to be no Law. 1 H. P. C. 552. 1 H. P. C. 523. 1 H. P. C. 554. Hut. 20. Discourse, for 1 Hawk. 164.

Burglary. *Vide Co. Pl. Cor.* 64. But that in that Case of *Baynes*, it is there said, that it was resolved by them there likewise, that that stealing was such a Robbery for which he was ousted of the Benefit of his Clergy by the *Stat.* of 5 *E.* 6 *cap.* 9. and was hanged, which last Resolution I hold clearly not to be Law; for that that *Statute* of 5 *Ed.* 6. *cap.* 6. is only to enlarge the *Stat.* 23 *H.* 8. *cap.* 1. which amongst other Crimes took away Clergy from such Persons who robbed any in their Houses, their Wives, Children, or Servants being there, and put in fear or dread. Now that *Stat.* of 5 *Ed.* 6. ordained that although the Persons who were in the House, lay in some other part of the House, which was robbed, and were asleep at the Time, and so did not hear the Thieves, and consequently were not put in fear, yet that Statute taketh away Clergy in that Case; but notwithstanding there must be a Robbery, for both the *Stat.* of 5 *Ed.* 6. and the *Stat.* of 23 *H.* 8. is against such as shall rob Men in their Dwelling
1 Hawk. 145. Houses. Now the taking away of a Cup in which Men are drinking, as *Bayne*'s Case was, is only Larceny and no Robbery, for Larceny is described to be a fraudulent taking away of another Man's Goods above the Value of 12*d.* with an Intent to steal them, *Poulton de pace* 125, *b.* and Stamford *Pl. Cor.* 24. *a.* but Robbery is described to be a Rapine that is, a violent taking any thing from a Man's Person; and when it is applied to robbing of Houses, there must be the same circumstance of Force *Vide Poulton de pace* 128. *Stamford Pl. Cor.* 27, *a*, *b. Co. Pl. Cor.* 68. For of necessity there must be something to distinguish a Robbery in a House, from that which is but a mere Larceny, and that is one, *viz.* The Larceny is only fraudulent without any actual Force, and a Robbery is done with Force; and this will appear by examining the Nature of Burglary, which is the robbing of a House by Night, there must be Force committed, as the actual breaking of a House makes it Burglary: For if the Door of a House be open, and a Thief enter in the Night and steal Goods, this is only Larceny, and no Burglary, because there was no Force, which is that
2 Hawk. 494. which distinguished Robbery from Larceny. Now this Force, which will make a robbery of a House within those Statutes to take away Clergy, may either

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be an actual breaking of the House, or an Assault upon the Person. And therefore if Company come to drink in a Tavern, or other Victualing-house, and being there they break open a Door of another Chamber or Cupboard in the Wall which is fixed to the Freehold, and steal away Goods, this is a Robbery, for which Clergy is taken away by those Statutes. But the breaking open a Trunk or Box, and taking away things is no Robbery of a House within the Statute, because those things which were broken were no part of the House: and so likewise it is the case of Violence offered to the Person of a Man, and taking away his Goods with force. As in case a Thief cometh into a Man's House or Shop, the Door being open, and assaults the honest Man in the House or Shop, and taketh away things by Violence, this is likewise a Robbing of a House within those Statutes, but if in those cases he had come into the House or Shop, and privately stolen away any thing, that had been only Larceny, and not Robbery: and this exposition agreeth with the sense of the Parliament in the Statute of 39 *Eliz. c.* 15. which expounds Robbing of Houses in the day time to be the actual breaking them; for all former Statutes took away Clergy where a House was robbed in the day time, some Person being then in the House; but this Statute of 39 *Eliz.* recites the mischief, because Robbing of Houses when no Person was therein, was not so penal as Robbing them when some Person was therein, and thereby had Persons took opportunity to commit many Robberies in Houses when people were gone abroad to hear Divine Service, or gone to their Labour, and declareth that, that Robbery was, *viz.* by breaking and entering into Mens Houses at such time, and enacts that such Robbing of any House, and stealing from thence Goods of the value of 5*s.* they shall not have the benefit of the Clergy, which I think is a full exposition that Robbing of Houses; in that case, must be an actual breaking, that is, an actual force committed in breaking of the House; but in the other case that I put of Robbing a Man in his House by assault upon his Person, as where a Thief enters the House or Shop of a Man without any actual breaking, the Door being open, and by Violence takes away his Goods, in that Case I conceive the Indictment must express that he did assault him

1 H. P. C. 553.

2 H. P. C. 357. 2 Hawk. 496.

And the Stat. 1 *E.* 6. 12. calls that breaking of Houses, which the Stat. 23 *H.* 8. & 5 *E.* 6. calls robbing of Houses, and so expounds them.

2 Hawk. 500.

1 Hawk. 149. and in notis to sect 6, same page.

him and put him in fear, becauſe that Circumſtance is neceſſary to be laid to make it a Robbery from a Man's Perſon, and therefore 5 *Eliz. Dyer* 224, *b.* One being indicted for taking of Money from the Perſon of a Man by the High-way, had his Clergy, becauſe it was not ſaid that he was put in fear, and the Book ſaith *quod non eſt robberia* if the Perſon be not put in fear, although Goods be taken from his Perſon; and for that Cauſe was the Statute of 8 *Eliz. cap.* 4. made to take away Clergy from him who privily taketh away any Money or Goods from the Perſon of a Man. If Thieves come in- to a Houſe by Night, the Door being open, and take away Goods, this is no Burglary, as hath been ſaid before. But in that caſe, if they put any in the Houſe in fear and dread, and take away Goods, I hold this to be robbery of a Houſe, for which the Thieves are ouſted of Clergy by the Statute of 23 *H.* 8. *cap.* 1. If the indictment be laid, that they put thoſe in the Houſe in fear and dread, and that be proved upon the Evidence.

2 Hawk. 494.

2 Hawk. 497. 1 H.P.C. 552. P. 68.

2 Hawk. 500.

Meſſenger, Appletree, Baſely, Green, and others indicted for levying War and pulling down Bawdy-houſes, and breaking open Priſons.

2 St. Tr. 581. 1 H.P.C. 134. Foſt. 215.

Memorandum, That at the Seſſions at the *Old Bailey*, after *Eaſter* in the twentieth Year of King *Charles* the 2*d.* Several diſſolute Perſons having on *Eaſter* Tueſday and Wedneſday next before aſſembled together, and led by Perſons whom they called Captains, and having Colours, *viz.* Aprons, *&c.* on Staves, went to ſeveral places on pretence to pull down Bawdy-houſes, and break open Priſons and ſet Priſoners at Liberty, and having actually pulled down ſome Houſes, and broke up the Priſon at *Clerkenwell*, and let out four Priſoners there, were by the direction of the King's Councel, *viz.* *Mr. Attorney*, *Sir Jeffery Palmer*, having Order to proceed againſt them proſecuted, he directed four indictments to be preferred againſt them, who were taken, *viz.* one indictment againſt *Peter Meſſenger*, *Richard Baſely*, *William Green*, and *Thomas Appletree*, and another indictment againſt *Edward Cotton*, and a third againſt *Edward Bedell* and *Richard Lattimer*, and a fourth againſt *Thomas Limerick*. All the Indictments were, that they with other Perſons to the number of 500, unknown to the Jurors, being armed in a War-like manner with Swords, half Pikes, Halberts, long Staves and other Armes Offenſive and Defenſive, with Force and Arms unlawfully, and

and traiterously assembled themselves together, and levied War against the King, &c. and first I told them they had not done well to make so many several indictments, for by that means the King's Evidence would be broken, whereas if all had been put into one indictment, the Evidence as to the main Design would have been intire against all, and then the assembling in several places to the same intent had made the matter more foul, and would have been aptly given in Evidence against them all to the same Jury, and the several Acts which each of them did, would have come in better; but however we proceeded upon the indictments as they were, and after the Evidence given against the four in the first indictment, when I came to give Directions to the Jury, I told them that although I was well satisfied in my own Judgment, that such assembling together as was proved, and the pulling down of Houses upon pretence they were Bawdy-houses, was High-Treason, because they took upon them regal Power to reform that which belonged to the King by his Law and Justices to correct and reform: and it would be a strange way and mischievous to all People to have such a rude rabble without an indictment to proceed in that manner against all Persons Houses which they would call Bawdy-houses, for then no Man were safe, therefore as that way tore the Government out of the King's Hands, so it destroyed the great privilege of the People, which is not to be proceeded against, but upon an indictment first found by a Grand Jury, and after upon a legal Tryal by another Jury where the Party accused was heard to make his defence; yet I told them, because the Kings of this Nation had oftentimes been so merciful as when such Outrages had been heretofore done not to proceed capitally against the Offenders, but to proceed against the Offenders in the Star-Chamber, being willing to reduce their People by milder ways if it were possible to their Duty and Obedience; yet that lenity of the King in some Cases did not hinder the King when he saw there was need to proceed in a severer way, to take that course which was warranted by Law, and to make greater Examples, that the People may know the Law, is not wanting so far to the safety of the King and his People, as to let such Outrages

rages go without capital punishment, which is at this time absolutely necessary, because we ourselves have seen a Rebellion raised by gathering People together upon fairer Pretences than this was, for no such Persons use at first to declare their wickedest Design, but when they see that they may effect their Design, then they will not stick to go further, and give the Law themselves, and destroy all that oppose them: but yet because there was no body of the Long Robe there but my Brother *Wylde*, then Recorder of *London*, and myself, and that this Example might have the greater Authority, I did resolve that the Jury should find the matter Specially, and then I would procure a meeting of all the Judges of *England*, and what was done should be by their Opinion, that so this Question might have such a Resolution as no Person afterwards should have reason to doubt the Law, and all Persons might be warned how they for the time to come mingle themselves with such Rabble on any kind of such Pretences, and thereupon the Jury as to the first four in the first indictment gave a Special Verdict to this Effect, *viz.*

A Special Verdict as to *Messenger*, *Appletree*, *Basely* and *Green*.

They find that the 24*th of March* last, a great number of Persons to the number mentioned in the Indictment were assembled together in *East Smithfield* and *Moorfields* in the County of *Middlesex* with Arms mentioned in the Indictment, on pretence of pulling down Bawdy-houses, that *Basely* led them, and was called their Captain, and had in his Hand a naked Sword which he brandished over his Head, and that *Messenger* had a piece of green Apron on a Staff, which he flourished as Colours in the Head of the Company, and that *Basely*, and he led the Company as their Leaders; that they did the like on Wednesday the 25*th* of *March*, and were breaking down Houses. That *Peverell*, one of the Constables of *Middlesex*, having a Constable's Staff in his hand, came to them with other Persons to aid him, and charged them to depart and keep the Peace, and thereupon, *Basely* with his Sword struck him, and wounded him, and several Persons assembled with him, struck him down, and took away his Constables Staff. That the said *William Green* was among them casting up his Cap, and hollowing with a Staff in his Hand, and that whilst he was amongst them he was knocked Down by a Party of the King's Soldiers that

that came to suppress them, and was then taken. That *Basely* struck at the Ensign that led those Soldiers: that the said *Appletree* was among them both Days, and was the first that struck at *Peverell* the Constable, and was amongst them at *Burlingham*'s House at *Saffronhill* in the County of *Middlesex*, and pulled part of the House down, and the next House to it, and struck at one that admonished him to be quiet. And if on the whole matter, it shall seem to the Court that they are guilty of the Offence mentioned in the Indictment, then they find them Guilty, *&c.*

On the 2*d.* Indictment as to *Cotton* alone, the Jury did find that at the time and place mentioned in the Indictment, a great number of Persons, to the number mentioned in the Indictment, met together armed with Swords, Clubs, Staves and other Weapons, under pretence of pulling down Bawdyhouses, and had a Cloth on a Staff for an Ensign carried before them. And that *Sir Philip Howard*, with a Troop of the King's Guard, found them armed in such seditious manner, and commanded them to disperse, that they refused so to do, and threw Stones at him, that some of them enquired who it was that led those Guards, whether it was the Duke of *York*, and being told it was, they presently threw Stones at *Sir P. H.* who led the Horse, and some of them said that unless the King would give them liberty of Conscience, *May-Day* should be a bloody day, others did Kill the Guards, and others said, that they would come and pull down *Whitehall*, and others said they would be with them at *Whitehall*, (the King's Capital Palace) and that they cared not for the Guards, for they were but 2 or 300, and they could easily knock them on the Head; that they continued many Hours till they were dispersed by the Guards. That *Cotton* who was indicted, was one of them assembled in this manner, and that *Cotton* was amongst them the next day when they were assembled in the same manner, and was pulling down a House in the Parish of *St. Leonard Shoreditch* in the County of *Middlesex*; and if on the whole matter, *&c.*

Special Verdict also as to *Cotton*. 2 St. Tr. 591.

On the third Indictment against *Bedell* and *Lattimer*, the Jury find that the day and place mentioned in the Indictment, a great number of Persons to the number mentioned

Special Verdict on the the third Indictment. *Bedel* and *Lattimer*. 2 St. Tr. 591.

mentioned in the Indictment armed as in the Indictment, did meet together in *Clerkenwell Green* in the County of *Middlesex*, on pretence of breaking open Prisons, and releasing Prisoners; that one of them who had a half Pike in his Hand, owned himself to be their Captain; that they came so assembled together to a Place there called the New Prison, being a publick Prison of the County of *Middlesex*, and then and there said, that they came to search for Prisoners, and break open the Prison Doors, and let out four Prisoners, two whereof were committed thither for Felony, and two for other Offences, and that they being charged to depart, replied, they had been Servants long, but now they would be Masters; that some being taken, they cried one die and all die: That *Lattimer* was amongst them, and active in breaking of the Prison, and was with the rest in the Prison after it was broken open; And that *Bedell* was there, and being pursued by one of the King's Soldiers, called out to the rest of the Company to face about, and not to leave him, and if on the Whole, &c.

Special Verdict as to *Lymerick*. 2 St. Tr. 591.

On the fourth Indictment against *Lymerick*, the Jury find that the Day, Year, and Place in the Indictment mentioned, a great number of Persons to the number, &c. assembled together on pretence of pulling down of Bawdy-houses, and being armed *prout* in the Indictment, they marched in warlike Manner, and the said *Lymerick* led them as their Captain with a Club in his Hand, and was owned by the Company to be their Captain: That the said *Lymerick* had the said Persons to the House of *Peter Burlingham*, and they pulled down the said House, and destroyed and took away divers Goods of the said *Burlingham*'s to the value of 30*l.* And if on the whole Matter, &c.

And in *Easter* Term following, all the Judges met at my Chamber, there being then but eleven. My Lord *Bridgeman*, who was Chief Justice of the Common Pleas being then Lord *Keeper*, the Judges were myself, Chief Justice of the King's Bench, Sir *M. Hales* the Chief Baron, and my Brother *Atkins*, Brother *Twisden*, Brother *Tyrell*, Brother *Turner*, Brother *Wyndham*, Brother *Archer*, Brother *Rainsford*, Brother *Morton*, and Brother *Wylde*.

And

And on the whole Matter the Chief Baron *Hales* delivered his Opinion, that there was no Treason in the Case, because he said that the *Stat.* Q. *Mary*, *cap.* 12. is, that if any Persons to the number of Twelve or more assemble to the Intent to pull down Enclosures, &c. with Force, and continue together an Hour after Proclamation made for their departure it shall be Felony, and if those Actions had been Treason at Common Law, it had been to no Purpose to make it Felony. 1 Hawk. 554. 1 H.P.C. 134. The Reasons of Hales Opinion in this Case. 1 H.P.C. 131. 2 St. Tr. 593.

But all the other Judges answered, that this was the Objection made by some Judges in the Case of *Bradshaw* and *Burton*, which is reported by *Popham* in his Reports, *p.* 122. And there it was resolved, that if any Persons assembled with Force to alter the Laws, or to set a price on Victuals, or to lay violent Hands on the Magistrate as on the Mayor of *London* and the Like, and with Force attempt to put the same in Execution, this is a Rebellion and Treason at the Common Law; and they there resolved that the Statute of 1 *Mary* was to be intended where Persons to the number of Twelve or more pretending any or all of them to be injured in particular, as by Reason of their common or other Interest in the Land inclosed, and the Like, assemble to pull it down forcibly in Casea where they have an Interest, or where in particular, they are annoyed or grieved, that is no Treason: But in case their Act goeth generally to pull down Inclosures in which they, or any of them are not particularly concerned, this Act if it be put in Execution by force is Treason at Common Law. And it was agreed by us all, that the *Stat.* of 13 *Eliz.* which maketh the Intention in many cases Treason, extends to nothing, but where if the Act had been done it had been Treason at the Common Law. 2 St. Tr. 593.

And therefore all the rest of the Judges did unanimously agree that this rising with Intent to pull down Bawdy-houses in general, or to break open Prisons in general, and let out Prisoners, and putting their Intention in Execution by Force, any of these Instances was a levying 2 St. Tr. 593.

War againſt the King, and High Treaſon at Common Law within the Declaration of the *Stat.* of 25 *Ed.* 3. And for that, beſides the Reſolution in *Popham*'s Reports before cited, we conſidered the Caſe of the Apprentices reported in the ſecond Part of *Anderſon*'s Reports, *p.* 4 and 5, where it was reſolved that by the Statute of 13 *Eliz.* If any intend to levy War for any Thing which the Queen by her Laws and Juſtice ought to do, and reform in Government as Queen, this ſhall be an intendment to levy War againſt the Queen within that Statute of 13 *Eliz.* And as we ſaid before, nothing can be Treaſon by the Intention within the Statute which had not been Treaſon by the Common Law, if it had been actually put in Execution. And ſee the ſame Book of *Anderſon* ſecond Part 66, and by the caſe of ſeveral Perſons in *Oxfordſhire* riſing to pull down Incloſures in general, reſolved accordingly, in which Caſe it was alſo reſolved, that if any Perſons riſe and aſſemble together, with intent to levy War, the Juſtices of the Peace and Sheriffs may uſe Force to ſuppreſs ſuch Rebels without any ſpecial Commiſſion or Warrant, and this by the Common Law: And ſee *Popham*'s Reports 121, and a Reſolution of all the Judges, 39 *Eliz.* that any Juſtice of the Peace, Sheriff, or other Magiſtrate, or any other Subject of the King may by the Common Law arm themſelves to ſuppreſs Riots, Rebellions, or reſiſt Enemies and endeavour themſelves to ſuppreſs ſuch diſturbers of the Peace: But they ſaid the moſt diſcreet Way was for every one to attend and aſſiſt the Juſtices in ſuch Caſe, or other Miniſters of the King in doing of it, and *Cook Pl. Cor.* 9. If any levy War to expulſe Strangers, to deliver Men out of Priſon, to remove Councellors, or to any other and pretending Reformation on their own Heads without Warrant, this is a levying of War againſt the King, becauſe they took upon them Royal Authority. And *Moor*'s Reports, *p.* 620, 621. in the Caſe of the Earl of *Eſſex*, in which amongſt other Things it was reſolved, that his attempt with Force to remove the Queen's Councellors was High Treaſon, and likewiſe that the Earl of *Southampton*, who adhered to him, although he knew of no other purpoſe of the Earl of *Eſſex*, but a private Quarrel againſt ſome of the Queen's Servants, yet this was Treaſon in him, the

Pl. 49.

3. H. 7. 1. 10. Popham 121. 1 Hawk. 298. 2 St. Tr. 594.

1 St. Tr. 197.

the Act of the Earl of *Essex* being Rebellion and Treason, and so it was also resolved, that all those who went with him out of *Essex-house* in aid of him, it was Treason in them, whether they knew any thing of his Intent or not, and *Cro. 1st part p.* 583. In *Benstad*'s Case, it was resolved by all the Judges, that going to Lambeth-house in Warlike Manner with Drums, and a Multitude as in the Indictment, to the Number of 300, to surprize the *Arch-Bishop*, who was a Privy Councellor, was Treason. And *2dly*, it was resolved that the Justices of *Oyer* and *Terminer*, may sit, enquire and try Prisoners all in one Day. *3dly*. It was resolved, that the breaking of a Prison wherein Traitors were in durance, and causing them to escape, was Treason, although the Parties did not know that Traitors were there. And so to break a Prison whereby Felons escape, this is Felony, though they do not know them to be in Prison for such Offence. *Note*, That Resolution as to breaking a Prison where Felons, *&c.* are, must (as I think) be intended only where the Intent was only to break open one Prison and no more, for if the Design was to break open Prisons in general, and they put that in Execution as to one Prison, that is High Treason according to the Books before cited; but then on the Evidence it must be proved that their Intent was such, and by such proof as satisfieth the *Jury*.

Cro. Car. 1 Jones 455. S. C.

Cro. Car. 583. Cro. Jac. 404. Cro. Car. 448. con.

After this Resolution in general, we went to consider the particular Cases as they were found upon the several special Verdicts; and thereupon it was agreed by all of us, except the Chief Baron, who said he doubted on the Main, that as to *Messenger* and *Basely* in the first Verdict, and to *Cotton* in the second special Verdict; and as to *Lymerick* in the fourth special Verdict, that the Matter as was found against these four, was High Treason in them all, and accordingly they had Judgment, and were executed: But as to *Abpletree* in the first special Verdict; and as to *Lattimer* in the third special Verdict, there was difference in Opinion amongst us, whether

2 St. Tr. 594.

whether the Verdict was sufficiently found against them to judge it High Treason or not. For besides the Chief Baron who was against all, my Brother *Atkyns*, *Tyrell*, *Wyndham*, and *Wylde*, held that the Verdict was not sufficient against those two for to give Judgment that they were guilty of Treason, because they said it was not expresly found, that they were aiding and assisting: But myself, Brother *Turner*, *Twisden*, *Archer*, *Raynsford*, and *Moreton*, thought the Verdict as it was found against them to be as full and plain as any of the Rest. For first as to *Appletree*, the Verdict first finds in general, that the Number in the Indictment were assembled, as in the Indictment, with an Intent to pull down Bawdy-houses; that *Basely* led them as their Captain, that *Messenger* had a green Apron upon a Staff, which he flourished as Colours, and then that *Appletree*, the Person now in Question, was amongst them both the Days, and was the first that struck at *Peverell* the Constable, and was amongst them at *Burlingham*'s House at *Saffron-hill*, and pulled part of that House down, and the next to it, and struck at one that admonished him to be quiet, so that here are several Acts of Force found to be actually committed by him in pursuance of their Design, and then there is no need to find him to be aiding and assisting, for that Clause we said was only necessary to be found where the Jury find a Person was there among them, and find no particular Act of Force done by him, but only his Presence, there it is necessary that they find he was present aiding and assisting; and for the same Reasons we held the Verdict to be full also against *Lattimer*, because it was first found that the Multitude was assembled as in the Indictment, on pretence of breaking Prisons and releasing Prisoners in general, which is agreed by all (except the Chief Baron) to be Treason, and then they find that *Lattimer* was amongst them, and active in the breaking open the Prison at *Clarkenwell*, (where Prisoners, some for Felony, and others were let loose) and that he was with the rest in the Prison after it was broken open,

open, and ſo an Act fixed upon him: But although ſix of us were well ſatisfied in our Judgments as to them, yet when I waited on the King, I acquainted him that there was ſome difference in Opinion as to thoſe two upon finding of the ſpecial Verdict; and although the greater Number of us were of Opinion, that the Verdict was well found as to thoſe alſo, yet I intreated his Majeſty to make uſe of that difference in Opinion to ſhew his Mercy towards them, the rather becauſe we had agreed, that as to four of them the Verdict was clearly good as to proceed to Judgment againſt them, and that I hoped would be example enough to deter others from the like Practices; and beſides it would appear an Inſtance of his Majeſty's great Mercy, that he would not proceed to the laſt extremity againſt any, where there was not a full Concurrence of all his Judges, which his Majeſty was pleaſed to take very graciouſly, and ordered me to proceed accordingly, and ſo they two were ſpared: But as to *Green* in the firſt ſpecial Verdict, and *Bedell* in the third ſpecial Verdict, we all agreed that the Verdict was not full enough as to them for us to judge it Treaſon in them, becauſe the Verdict only finds that they were preſent, and finds no particular Act of Force committed by them, and doth not find that they were aiding and aſſiſting to the reſt, and it is poſſible one may be preſent amongſt ſuch a Rabble only out of curioſity to ſee, and whether they were aiding and aſſiſting is matter of Fact which ought to be expreſly found by the Jury, and not to be left to us upon any colourable Implication, and accordingly theſe two were diſcharged.

1 Hawk. 55.

2 St. Tr. 524.

2 St. Tr. 59.

This Queſtion was moved to me at the *Old Bailey*; A Man marrieth two Wives, one in *France* and another in *England*, whether he might be indicted and tryed for that Felony here in *England*; and I took this difference, that if his firſt Marriage was in *France*, and the ſecond Marriage, which maketh the Felony, was in *England*, then I was of Opinion that he might be indicted and tryed here for it, and the Jury might on Evidence find his

A man marrieth two Wives, one in *France* and another in *England*, in what Caſe he may be tryed here.

2 Hawk. 315.
1 H.P.C. 693.

his first Marriage in *France*, being a mere transitory Act, and having nothing of Felony in it; and our *Juries* usually find such transitory Acts, though they are done in a Foreign Nation; but if the first Marriage was in *England*, and the second in *France*, then I was of Opinion he could not be tryed for it here, because the Act which made the Felony was done in another Kingdom, and Felonies done in another Kingdom, are not by the Common Law triable here in *England*. *Quære**:

Diversity. *Vide Syderfin's Reports, fo.* 171. 1 Hawk. 171.

Counterfeiting the Great Seal. 1 Hawk. 61.

By counterfeiting the Great Seal, what shall be Treason and what not, see *Co. pl. Cor. fol.* 15, 40. *Ass. pl.* 34, 42 *E.* 3. The Abbot of *Brewer*'s Case, who caused his Commoygn to raze the Name of one Manor in Letters Patent under the Great Seal, and to put in another Manor instead of it, and 2 *H.* 4. *fol.* 25. 37 H. 8. *Br. Title Treason.* But after all these Books was *George Leake*'s Case, a Clerk of the Chancery, who joined two clean Parchments fit for Letters Patents so close together with Mouth-glew, as they were taken for one, the uppermost being very thin, and did put one Label through both, then upon the uppermost he wrote a true Patent, and got the Great Seal put to the Label and the Seal were annexed to both the Parchments, the one written, the other a blank; then he cut off the glewed Skirts round about, and took off the uppermost thin Parchment in which the true Patent was writ from the Label which with the Great Seal did still hang to the blank Parchment, then he wrote another false Patent upon the blank Parchment and published it as a good Patent: And the Question was, whether this Offence was High Treason or not: And it was resolved by all the Judges of *England*, that this Offence was not High Treason, but it was a very great Misprision. *Vide Hale Pl. C.* 18.

George Leake's Case concerning the abuse of the Great Seal. *Hill* 4 *Jacobi. Coke* 12 *R. p.* 16. 1 H.P.C. 182.

* "Why not? For the Words of the Statute are, that the Parties so offending, shall receive such and the like Proceeding, "Trial and Execution, in such County where such Person or Persons shall be apprehended, as if the Offence had been committed in such County where such Persons shall be taken or apprehended." 1 Hawk. 175, and Notis ibid.

A Per-

A Perſon hireth Lodgings in another Man's Houſe, with Hangings, Bedding, and other Furniture in thoſe Lodging for a Month, and during that Time, conveyeth away the Goods in the Lodging which he had hired with the Lodging, and the Party runeth away at the ſame Time, and is after taken and indicted for this as for Felony, and whether this be Felony or not is the Queſtion.

This is not found in the original Manuſcript, but may be fit to be reported, becauſe ſaid to come from Mr. *Serjeant Kelyng*, Son to the Chief Juſtice. 1 Hawk. 137. and Not. ibi.

This Caſe is in this Book, and came before my Lord *Bridgman*, then Chief Juſtice of the Common Pleas, myſelf then Judge of the King's Bench, and my Brother *Wylde*, then Recorder of *London*, at a Seſſions in the *Old Bailey*, and then we all were of Opinion that this was no Felony, becauſe the Party had a ſpecial Property in the Goods by his Contract, and ſo there could be no Treſpaſs, and that there could be no Felony where there was no Treſpaſs, as was reſolved in *Holmes*'s Caſe, who ſet Fire to his own Houſe, which was quenched before it went any further, and accordingly the Priſoner was by us then diſcharged.

Vide Ante 24. *Raven*'s Caſe. 1 Jon 351. Cro. Car. 376, 7. Ante 29. Sed vide Foſt. 116.

But upon more ſerious Thoughts I take it to be a Caſe worthy of great Conſideration, becauſe I think the Caſe in the 13 *Ed.* 4. *fo.* 9. which was by the King and his Council referred to all the Judges in the *Chequer-chamber*, and by them reſolved to be Felony, is a ſtronger Caſe than the Caſe now put.

There the Caſe was, one bargained with another to carry ſome Packs of Goods for him to *Southampton*, and delivered the Goods to the Carrier, and he taketh them and carries them to another Place, and there opens the Packs, and takes the Goods, and diſpoſes of them to his own Uſe, and the Queſtion was, whether that was

Felony or not; and though it was objected that the Goods were bailed to the Carrier, and therefore there could be no Felony, that was agreed generally to be good Law. And it was also objected that an Indictment against one that he *felonice asportavit*, such Goods is not good, but it must be *felonice cepi & asportavit*, and in that Case the taking was lawful; yet it was resolved that it was Felony, because his subsequent Act of carrying the Goods to another Place, and there opening of them, and disposing of them to his own Use, declareth that his Intent originally was not to take the Goods upon the Agreement and Contract of the Party, but only with a Design of stealing them. Now methinks the Case in Question is much stronger: For in that, the Party himself cometh to hire the Lodgings and Goods, and when he after taketh them away, this declareth that his original Intent was only by the hiring of them to give himself the Opportunity to steal them, and so his first hiring them is, *in fraudem Legis*, and of that he shall take no Advantage, *Co. Pl. Cor.* 64. Some under pretence of a Robbery raise a Hue and Cry, and call a Constable to search a House in the Night Time, and the Constable coming, the Owner of the House, opens the Door, and then those Persons bind the Constable, and those in the House, and Rob them, this is Burglary; because they procured the Door to be opened to them in the Night by Fraud: So in this Case, the Party hiring the House by Fraud, only to have an Opportunity to steal the Goods, shall not take Benefit of the Fraud. And Mr. *Lee* told me, that it had been resolved, that, *if one come into* Smithfield *on pretence to buy a Horse, and cheapen one, and the Owner giveth him leave to take the Horse and ride him to try his paces, and then he taketh the Horse and rideth quite away with him, this is Felony.* And if one deliver Goods to a Porter in *London* to carry to a certain Place, and he taketh them and carrieth them away to another Place, and there openeth and disposeth of them, this is Felony; which last Case seemeth to be warranted by the Case before cited out of 13 *E.* 4. *Note*, That the breaking open the Packs

1 H P.C. 552.
1 Hawk. 161.

and

and disposing of the Goods is necessary to shew the Intent of stealing.

But I marvel at the Case put, 13 *E.* 4. 9. That if a Carrier have a Tun of Wine delivered to him to carry to such a Place, and he never carry it but sell it, all this is no Felony; but if he draw part of it out above the Value of Twelve-pence, this is Felony; I do not see why the disposing of the Whole should not be Felony also.

But the Case there put is, a Carrier does carry the Goods to the Place appointed, and after takes them away and disposeth of them, that is Felony, because the Bargain for his bringing them was determined when he brought them to that Place appointed, and the Possession then is in the first Owner.

A Man having a Dwelling-house lets a Cellar, to which the Passage is out of a Street and a Chamber, to *J. S.* and lieth in the Chamber, and the Cellar is broken open in the Night. If this be Burglary? I thought not, and took a difference betwixt an Inmate and a divided House, which is, where there are several Doors, and one Dwelling actually divided and separated from the other, there it is Burglary, and shall be laid for breaking the Dwelling-house of him who hired the divided Part. But as to an Inmate who goeth in at the same Door, he is in the Nature of a Lodger, and if his Chamber be broken open, I thought it Burglary. But you must lay the Indictment for breaking the Dwelling-house of him that let it, and not of the Inmate, because I thought it was but one Dwelling-house, in case there be twenty Inmates: And though there be a private Contract between the Parties, that hath not severed the Dwelling-house, so as to make them several Dwelling-houses. For then, what need that difference of Inmates and divided Houses? For

1 Hawk. 164. Contra. But with a Quære in the Margin.

1 Hawk. 161. 1 H.P.C. 356. Contra. 1 Hawk. 163. Cowper 2.

if an Inmate hath a divided Dwelling-houſe, he differs nothing from the other. But Mr. *Lee* deſired that it might be adviſed of, becauſe he ſaith their uſe hath been otherwiſe, and he ſaid that elſe, if the Rooms of the Inmate where he lieth were broken open in the Night Time, there would be no Burglary, becauſe he ſaid the Contract had ſevered them from the Dwelling-houſe of him who let them. But in that I differed; for I think that where there is but one out Door, at which the Owner and Inmate enter, this remaineth to be all the Dwelling-houſe of the Owner; and though the Inmate hath an Intereſt againſt the Owner that will not ſerve to make it the Dwelling-houſe of the Inmate. But the Indictment muſt be for Burglary, in breaking the Dwelling-houſe of the Owner, and ſtealing the Goods of the Inmate. (*Quære.*)

1 H. P. C. Contra 556.

But for the firſt Queſtion, where a Cellar which hath its going into it only out of the Street is let to a ſtranger; if this Cellar is broken open, I conceive it no Burglary, for it is ſeparated by the Contract, and actually ſevered from the Houſe by excluding all Communication with the Houſe, no paſſing being betwixt the Houſe and the Cellar. So it hath been reſolved, if a Man let a Shop only, and ſever it from his Houſe for Years, &c. and the Party who hath the Shop doth not lodge in it, and this be broke open in the Night, this is no Burglary. And how to make ſuch a Cellar and a Chamber in the Dwelling-houſe, which are let to an Inmate to be the Inmate's Dwelling-houſe, I do not well underſtand: Then Mr. *Lee* ſaid it might be of ill Conſequence; for now ſince the late Fire, every Houſe hath many Inmates, where Inmates Lodge. And ſuppoſe he who hath the Dwelling-houſe (and lets the ſeveral Rooms to thoſe Inmates) ſhould in the Night break open their Rooms and ſteal their Goods, it would be hard if it ſhould not be Burglary. To that I ſay it is Felony in the Owner of the Houſe, if he ſteal their Goods; but to make it Burglary to break his own Houſe, in caſe the Law be as I ſuppoſe, that cannot be. And I ſuppoſe letting of Lodgings to ſeveral Perſons, doth not make ſeveral Houſes if they all go in at the Door of him who lets the Lodgings, and ſo are but Inmates.

1 H. P. C. 537.

1 Hawk. 163 contra.

But

But otherwise it is, if a Man sever some Rooms from his House, and make another Door to those Rooms, and so divide the House, that divided Part is the Mansion-house of him who hires it; and shall be laid so, for breaking the Dwelling-house of him who hired that Part *.

* See vide 1 Hawk. 163, 164. Sect. 14, 15, and Note to this last Section, where this Doctrine is controverted.

TERM. MICH.

15 CAR. II. In B. R.

1 Sid. 159. 1 Keb. 584, 649, 659, 723. S. C.

Sir Charles Stanley's Caſe.

This is another Manuſcript of the Lord Chief Juſtice *Kelyng*. 1 Hawk. 121, 9.

SIR *Charles Stanley* and one *Andrews*, were tryed upon an Indictment of Murder. The Caſe was, Sir *Charles Stanley* was arreſted by a Bailiff, and endeavoured a Reſcue, and ſhot off a Piſtol at the Bailiff, and then the Bailiff cloſed with him and caſt him down, and after ſome of his Servants and others who came to aid him, killed a Servant of the Bailiff's who came in aid of the Bailiff: And it was reſolved by all the Court, *Hide*, Chief Juſtice

Juſtice, *Twiſden*, *Windham*, and *Kelyng*, that if the Party who is arreſted doth any Act of Violence to endeavour a Reſcue, and then after one of his Party killed the Bailiff, or any that cometh in his aid, this is Murder in the Party arreſted: For when ſeveral Men join in an unlawful Act they are all guilty of whatever happens upon it; and in the Lord *Dacre*'s Caſe which is mentioned, 34 *H.* 8. *Brooke Sect.* 237*. The Lord *Dacres* and *Manſell*, and others in his Company came unlawfully to hunt in a Foreſt, and being reſiſted, one of the Company when the Lord *Dacres* was a great Way off, and not preſent, killed a Man: Judged Murder in him and all the Reſt, and the Lord *Dacres* was hanged. But it was agreed, that if the Party who is arreſted yields himſelf, and makes no Reſiſtance, but others endeavour to reſcue him, and he doth not act to declare his joining with them, if thoſe who come to reſcue him kill any of the Bailiffs, this is Murder in them, but not in the Party arreſted. But in this Caſe Sir *Charles Stanley* by ſhooting his Piſtol, had joined in reſiſting the Authority of Law, and therefore a Man being ſlain in this Act, it is Murder in him. And as for *Andrews*, there was no Evidence, but out of his own Mouth; ſome diſcourſe as if he had ſhot over Sir *Charles Stanley* in aid of him when he was down, but the Evidence to that was ſlight. But it was agreed by us all, that if a Man be arreſted, and while they are fighting, one who knows nothing of the Arreſt coming by the Way, goeth in aid of the Perſon who is arreſted, and draws his Sword, &c. here if any of the Bailiffs be killed, that Perſon who joined in aid againſt them, though he did not know of the Arreſt, yet is guilty of Murder. For a Man muſt take heed how he joineth in any unlawful Act as fighting is, for if he doth, he is guilty of all that follows. And it being Murder to kill thoſe who come to execute the Law; every one who joins in that Act is guilty of Murder, and his Ignorance will not excuſe him, where the Fact is made Murder by the Law without any Malice precedent, as in the Caſe of killing

Moore 86. 1 H.P.C. 439, 465. Crompt. 25. Dalt. J. Cap. 93, p. 241. n. ed. Cap. 145. p. 472.

* The above Blank is in the principal Caſe in the Edition of this Work, publiſhed by Sir John Holt; but the Caſe there cited is to be found in Moore 80, and it is there ſaid to be in Eaſter. 10 Eliz. though Brooke Tit. Corone 171, (and not 237,) as above cited. It is ſaid to be as in the Text, and Crompton, who cites for this Caſe Stowe's Annals, fo. 582, alſo fixes it in 34 H. 8.

killing a Bailiff. But if two Men go upon Malice prepenſed to fight a Duel, and while they are fighting, a Man who is acquainted with one of them joineth and taketh his Part and killeth the other, this is Murder in the Party who came with Malice prepenſed to fight; but it is but Manſlaughter in him who came to his aid, becauſe in him there was no Malice, but as to him it was a ſud-
1 H.P.C. 665. den Thing. And here the Law doth not imply Malice, as it doth in every one who reſiſteth the Execution of Juſtice.

TERM. MICH.

8. WILL. 3.

Liſle's Caſe, in *Banco Regis*.

AT the *Aſſizes* and *Gaol Delivery* held for the County of *Cumberland*, at *Carliſle*, 15 *Aug.* laſt, before Sir *Edward Ward* Lord Chief Baron, and Juſtice *Turton*, *Thomas Liſle* Gent. was indicted for the Murder of *Richard Armſtrong*, upon which he was arraigned, tried, and convicted of Manſlaughter only. Immediately after, *John Armſtrong*, brother of *Richard*, put into the Court a Bill of Appeal for Murder, and did then pray his Council, that the Appeal ſhould be received and filed, and that *Liſle* ſhould be immediately arraigned thereupon. Whereupon, and before the Appeal was arraigned, *Liſle* did demand the Benefit of his Clergy; and then the Bill of Appeal by the Council of *Armſtrong* was read in open Court, and *Liſle* did appear thereunto, and prayed to be bailed, but refuſed to plead; upon which he was remanded to the Gaol *quibuſque*, &c. All which Proceeding was entered upon the Record of the Indictment of Murder, with the Conviction of Manſlaughter, and returned upon a *Certiorari* into this Court, and thereupon the Appeal of Murder was alſo returned; but upon the Record of that, no Mention was made of any Proceeding. *Liſle* was alſo brought to the Bar upon an *Habeas Corpus* directed to the Sheriff of *Cumberland*, and was committed to the *Marſhalſea*,

Trem. 20. Skinner 670. Carthew 394. Comb 410. Salk. 60. 12 Mod. 108, 109, 157. Holt 53. S. C.

ſhulſea, (though he prayed to be bailed;) but the Court did not think fit to bail him for the Preſent; for it being the latter-end of the Term, did adjourn the Conſideration of it to the next Term; at which Time *Liſle* being brought to the Bar by Rule, the Court was of Opinion that he might be bailed. The Queſtion was, whether one convicted of Manſlaughter might be bailed before he had his Clergy? The Caſe of *Dyer* 297 & 42*. is, that he cannot be bailed; which may be admitted to be Law, for though Juſtices of *Oyer* and *Terminar* and *Gaol Delivery*, might not bail in ſuch a Caſe, yet the *King's Bench* is not reſtrained from bailing by the Statute of 1 *W. c.* 5. 2 *Inſt.* 885. but hath a Liberty of bailing by the Common Law, if the Perſon be not attainted. And ſo was it done in this Court, 10 *Jac. Coke's Entries* 355†. upon the like Conviction of Manſlaughter, upon a Trial at the Bar: The Court, without calling the Party to Judgment, took Time to adviſe until the next Term, and bailed the Priſoner then to appear. Afterwards at another Day, it was queſtioned, whether the Court ſhould call *Liſle* to know what he could ſay why Judgment ſhould not be given againſt him, and if he ſhould demand the Benefit of his Clergy, allow it to him? And after Argument at the Bar it was reſolved, that foraſmuch as there was a *Record of Conviction returned to the* King's Bench, *the Court ought to proceed to Judgment thereupon, though there was an Appeal returned to be commenced.*

2 Hawk. 153. S. r. 911. Rex v Dalton 1242. Rex v. Magrath.

For theſe Reaſons:

1. Though the Appeal was not totally diſcontinued, but had an Exiſtence, yet it was without Day; for being commenced at the *Gaol Delivery*, it had no continuance upon it, nor indeed could it have any, for no continuance can be taken from one Seſſion of *Gaol Delivery* to another, but from one Day to another it may be, if that Seſſion be adjourned, which doth not appear in this Caſe; but all Proceedings upon Indictments and Appeals commenced

2 Hawk. 224. Note to Sect 10. Carth. 394, 395. Skinner 670. Bac. Abr. 126.

* This ought to be, as I believe, Dyer 179. Pl. 42.
† Tit *Indictment*, Pl. 6.

at

at one *Gaol Delivery*, unleſs Convictions thereupon, are determined by that Seſſion, ſo that this Appellant and Appellee have no Day in any Court; and the Appeal being removed into the *King's Bench*, the Parties having no Day in the Court, the only means to retrieve it, is, for the Appellant to come into Court, and pray that the Appellee being *in cuſtodia Marr'* may be arraigned; and if he was not in the Marſhal's Cuſtody, take Proceſs againſt him, 9 *H.* 4. 2. *St. P. C.* 65 1*. which may be done at any Time. But if the Appellee be deſirous to be diſcharged of the Appeal, then he ought to ſue a *Scire facias* againſt the Appellant, and if he doth not appear nonſuit him, *St. P. C.* 70. *a. b.* From hence it is to be concluded, that ſince the Appeal is without Day, and cannot be proceeded upon unleſs revived in the Manner before mentioned, there is no Reaſon for the Court to take any Notice of it, but to proceed upon the Conviction had upon the Indictment, as if no Appeal had been commenced.

2. The Court, as the Matter ſtands upon this Record, ought to proceed upon the Conviction; for it appears that not only the Indictment was preferred, but even the Trial and Conviction of Manſlaughter was before the Appeal commenced; and therefore by the expreſs Words of 3 *H.* 7. *That in Caſe of Murder, the Murderers ſhall at any Time be arraigned and determined at the King's Suit, within the Year, without tarrying for an Appeal* †. Now the Indictment being proceeded upon, and the Party tried before the Appeal commenced, the Court of *Gaol Delivery* ought to determine it; for though the Appeal interpoſes after Conviction, and before the Convict upon the Indictment is called to Judgment, yet the Judgment upon it hath relation to the Conviction, and on the giving of it no Notice is to be taken of the Appeal, nor is any Entry to be on Record, to hinder the Court from giving Judgment. And if the Trial was lawful, the Judgment thereupon muſt be as lawful, for otherwiſe it would be in the Power of a Perſon by putting in an Appeal to render the Verdict ineffectual, which is contrary to the Words and Intent of the Statute; for ſuppoſe 2 Hawk. 355.

* St. Pl. Cor. 165—as I believe.

† The contrary of this Doctrine ſeem to be holden by Coke. 3 Inſt. 131.

the

the Conviction had been for Murder, the Indictment being well commenced and proceeded upon, the subsequent Appeal cannot obstruct Judgment, but the Court ought to condemn the Prisoner, otherwise the Statute of 3 *H.* 7. is not observed, which requires not only a Proceeding on the Indictment, but a Determination: And the Statute would be as little observed if Judgment should be respited upon the Conviction of Manslaughter as upon a Conviction of Murder.

2 Hawk. 535. 3. By the Common Law no Conviction or Acquittal could be avoided by an Appeal interposing before Judgment: but though Judgment was respited, the Defendant in the Appeal might plead the Acquittal or Conviction had in Bar to the Appeal, *St. P. C.* 106. 16 *E.* 4. 11. 45 *E.* 3. 25. 4 *Rep.* 45. *Wrote* and *Wigges*; against which there are but two Cases, *viz.* 17 *Ass. p.* 1. which are contradicted by the Opinion and Observation of *B. tit. Appeal* 55. that declares the Common Law to be contrary until 3 *H.* 7. The other is *Dyer* 296. *p.* 20. which is so very strange, that it cannot amount to the least Authority. That Case was, *viz.* One indicted of Murder was convicted at the Gaol Delivery of *Newgate*, and before Judgment given the Wife brought an Appeal; to which the Defendant pleaded, that she had taken another Husband in a Foreign Country. The Matter resting about a Year, the Indictment was removed in *B. R.* and the Party convicted called to Judgment upon the Indictment, and he pleaded the Appeal depending; to which *Nul tiel Record* was pleaded; but afterwards the Plaintiff in the Appeal was non-suited, and then Judgment of Death was given against the Defendant. *Observe*, That Case is left with a *Quære*, and so no judicial Determination as to this Point, saving that the Man was hanged.

3 Inst. 131. S. C.

Stanley's Case.

1. The Court gave no Opinion concerning the sufficiency of the Plea.

2. It doth not appear how the Plaintiff became Non-suit.

For

For there was not any Opportunity for it, therefore it was irregular; for the Plea was discontinued by the *Certiorari*; for all Removals of Causes upon *Certiorari*'s determine the Plea; therefore that Case is no Authority, but only an History of what was done; for the Man was well condemned and executed upon the Conviction, and those Scruples then made were very unnecessary.

For which Reasons the Court did arraign *Lisle* upon the Conviction of Manslaughter, and he demanded his Clergy; which being allowed to him, he read as a Clerk, and was burnt in the Hand.

Armstrong versus *Lisle*.

Mich. 8 *W.* 3. *Rot.* 565.

IN the Appeal of Murder before mentioned, the Defendant sued out a *Scire facias* against the Plaintiff to prosecute his Appeal, returnable *Quinden' Pasch'*; at which Day the Plaintiff appeared, and by his Council at Bar did arraign the Appeal. It being prayed that the Defendant might answer thereunto, the Defendant pleaded the Indictment, and Conviction of Manslaughter at the Assizes, which was removed into the *King's Bench*; and that no Judgment was thereupon given; and that at the Time of the Conviction he was, and yet is a Clerk; and then prayed his Clergy, and offered to read as a Clerk if the Court would have admitted him thereunto; and that afterwards, on *Monday post Crastin' Pur' Beatæ Mariæ Virginis* last, being demanded by the Court why Judgment should not be given against him, he demanded the Benefit of Clergy; which being allowed to him, he read as a Clerk, and was burned in the Hand *prout per Recordum*, *&c.* with the usual Averments. And as to the Felony and Murder pleaded *Not Guilty*. To which Plea the Plaintiff

2 H.P.C. 390.
2 Hawk. 535.

Plaintiff made a frivolous Replication, and the Defendant thereunto demurred.

2 Hawk. 534. The Question was, whether this Plea was a good Bar to the Appeal? And it was resolved by the whole Court, that the Defendant being convicted of Manslaughter, and allowed the Benefit of Clergy, and reading as a Clerk, did bar the Apellant of his Appeal of Murder. And though the Reasons given in the former Case may be sufficient to justify this Resolution; yet many Things may be fit to be added for further Explication of this Matter, which hath for a long Time been in much obscurity, and laboured under very great variety of Opinion.

2 Hawk. 535. 1. The Conviction or Acquittal upon an Indictment of Murder or Manslaughter was at Common Law, a good Plea in Bar to the Appeal. For the Proceeding upon the Indictment may be Legal, though the Appeal was then pending; and if the Party convicted should have had Judgment of Death given against him if he was no Clerk, there is the same Reason he should have the Benefit of the Conviction and Clergy if he were a Clerk. The like if he be acquitted; for if convicted he should suffer Death, therefore if acquitted he should be discharged.

2 Hawk. 535. To the Authorities before cited, these may be added, *F. N. B.* 115. *h.* where an Appeal of Murder was depending, if within the Year and the Day, the Justices of Gaol Delivery did proceed to try the Appellee upon an Indictment of Murder, and he was acquitted, he might have a Writ of Conspiracy, though he was not tried upon the Appeal; which could not have been maintained unless the Acquittal upon the Indictment had been a perfect and absolute Discharge of the Offence, 21 *H.* 6. 28. *Fitz. tit Conspiracy* 6. 7. *H.* 4. 35. *Hale* 244. That an Acquittal upon an Indictment is a good Bar to an Appeal of Murder. The reason whereof is more strong in the Case of an Appeal of Death than in any other Appeal, *to wit*, of *Robbery* or *Larceny*, (in which an Acquittal upon an Indictment would be, and is to this Day, a good

Sum.

good Bar) *St. Pl. Cor.* 106. For the Appellant ſeeks only Revenge for the Death of his Anceſtor, without regard to the Publick: But in an Appeal of *Robbery* or *Larceny*, he is to have Reſtitution: but if a Perſon be murdered, the King proſecutes to have an Example of Juſtice made for the Safety of all his People; beſides, the King is more concerned in Intereſt, being to have the Forfeiture of all the Goods and Chattels of the Offender, and the Year, Day, and Waſte of his Lands.

And though the Proſecution at the King's Suit was frequently delayed for the Benefit of the Parties Appeal, yet that was not *ex proviſione Legis*, but merely by the Diſcretion of the Judges, for the more effectual Proſecution of the Offender, by encouraging the Perſons who where moſt concerned, and therefore were thought to be moſt zealous therein. This appears by *St. Pl. Cor.* 107. *Fitz. tit. Coron.* 44. 22 *E.* 4. when the Juſtices did agree, that that courſe of delaying to proceed on the Indictment within the Year ſhould be obſerved, for the ſake of the Parties Appeal, which was frequently practiſed before, but not ſo firmy eſtabliſhed until then. *Hale Pl. Cor. con.* ſo 40 *Aſſ. p.* 40. But the Miſchief thereof being in ſome few Years perceived, occaſioned the making the Statute of 3 *H.* 7. which aboliſhed that Liberty which the Judges took, and obliged them to proceed upon the Indictment at any Time within the Year, and upon no Account to tarry for the Appeal; and to encourage that Proceeding, ſaves the Benefit of the Appeal, notwithſtanding the Attainder or Acquittal, except when Clergy was had; for that Exception is to the Purview of the Statute, and ſhews what the Law was before, *viz. That when Clergy was had upon a Conviction or Attainder of Murder upon the Indictment, it was a good Bar of the Appeal before the Statute.*

2 Hawk. 530. 2 Hawk. 535. Sum. 245. 2 Hale P. C. 251.

It is moſt true, that if an Appeal was freſhly brought, and pending before the ſame Juſtices before whom the Appellee was indicted, the Court ought to proceed rather upon the Appeal than the Indictment, becauſe of the Intereſt

2 Hawk. 530. 2 Hawk. 535.

Interest of the Appellant, who in Case of Robbery ought to have Restitution, which upon an Indictment before 21 *H.* 8. he could not have; and in an Appeal of Death the Wife or heir might have Execution upon the Judgment (notwithstanding any Pardon) in Revenge of the Injury done to her or him: And the preferring the Appeal then pending, to the Indictment, was no hurt to the Publick Justice of the Kingdom; for if the Appellant was nonsuited, or did release either before or after Attainder, the Prosecution was devolved to the King, who might cause proceeding to be upon the Appeal, and Execution to be had upon the Indictment. But at the Common Law, if there was a default of fresh Suit, the Appeal was lost, if the Defendant did plead it in Abatement. *Vide Stat. Glouc. cap.* 9. *Bract. lib* 3. 139 *. 2 *Inst.* 319. *Qui appellare voluerit, debet ille cui injuratum fuerit, tam cito quam poterit, Hutesium levare, &c.* Therefore by such a neglect of fresh Suit, the Prosecution belonged to the King to proceed by way of Indictment. But in that Case the Appellee, upon an appeal commenced against him, could not take advantage of the want of fresh Suit, unless he had pleaded it. And in an Appeal of Robbery or Larceny, though the Defendant did not plead in Abatement the want of fresh Suit, but was thereupon convicted, yet the Appellant could not have Restitution unless the Jury did find fresh Suit.

2 Hawk. 530, 535.

But great Question hath been made, of what should be accounted a fresh Suit? *Vide St. Pl. Cor.* 165, 166. where, upon Consideration of all the Books, it is settled, *that it is not capable of any certain Definition, but must be determined by the Discretion of the Justices.* Now if the Party robbed, be not as ready to prosecute his Appeal, before the Justices of Gaol Delivery, as the King's Officers are to prosecute an Indictment, and the Offender be in Gaol; or if the Party shall chuse rather to Prosecute upon the Indictment; this is a neglect of the Appeal, and a default of fresh Suit, so far as to vest the Prosecution in the King; for though it is very reasonable to prefer

* Britton fol. 43. accord.

fer the Appeal to the Indictment, yet there can be no Reaſon to defer the King's Proſecution by any affected delay in the Party that ſhould bring his Appeal. Therefore, if at any Time the Court did proceed upon an Indictment, when an Appeal was depending; it muſt be preſumed, that the Perſon injured was negligent or remiſs in the Proſecution of the Appeal, or that the Appeal was convenouſly brought to obſtruct the King's Proſecution, which is the ſame in Judgment of Law, as if none was brought at all, or that the Party did chooſe to proceed upon the Indictment rather than the Appeal. And therefore at the Common Law in caſe of Death, and then, and now, in that of all other Felony, if one were tried and acquitted upon an Indictment, if the Perſon injured did bring his Appeal, and the Defendant did plead his acquittal, the Appellant could not reply that he brought his Appeal by freſh Suit; for that would be to arraign the Juſtice of the Court in a matter that is left to be tried by Examination; and to be determined by the Juſtices, for the Appellant might bring his Appeal convenouſly, or if really, choſe rather to proceed upon the Indictment.

Obj. But there is an Objection that ſeems plauſible, which is, that before the Statute of 3 *Hen.* 7. the Court was obliged by Law, not to proceed upon the Indictment of Murder within the Year and a Day; for though at Common Law, the Appellant was to make freſh Suit; yet the Statute of *Glouc. chap.* 9. hath given a Year and a Day to the Appellant to bring his Appeal, which is inſtead of freſh Suit: And therefore where there was freſh Suit, the Court ought rather to proceed upon the Appeal, than upon the Indictment. And ſince the Party hath a Year and a Day to bring his Appeal, there can be no default imputed to him until that Time be expired. 2 Hawk. 530, 535.

Reſp. To this I anſwer. Firſt, that the King, as to his Proſecution is not obliged by any Words in the Statute, but only the Defendant, if the Appeal be brought within the Year, is diſabled to plead in Abatement thereof 2 Hawk. 530, 535.

the want of fresh Suit. For the Statute was made for the advancement of Justice; but if there should be such a Consequence deduced from it, that the Defendant could not be tried upon the Indictment within the Year, it would tend much to the delay of Justice.

2 Hawk. 530, 535. *Resp.* Secondly, it appears, not only by all the Books before mentioned, that the not proceeding upon the Indictment was only an Agreement among the Judges themselves; but the recital of the Statute of 3 *H.* 7. doth not mention that, that delay was by Law; but only that it was used to tarry.

2 Hawk. 530, 535. 2 Hawk. 534. *Resp.* 3. Thirdly, That Agreement of the Judges plainly shews, that if the Defendant had been tried and acquitted or convicted, that would have been a good Bar to the Appeal, otherwise that delay would have been to no Purpose.

2 Hawk. 530, 35. *Resp.* 4. Fourthly, the Defendant in the Appeal could not hinder his being tried upon the Indictment, for he could not plead the Appeal depending, either in Bar, or in delay of the Trial, 43 *E.* 3. 25. *a.* 31 *H.* 6. 11. Now, if he was tried and acquitted upon the Indictment, and yet should be liable to the Party's Appeal, his Life must be twice in Jeopardy; so that though the Judges did do an Injury to the Appellant in trying the Prisoner upon the Indictment, either within the Year, or pending the Appeal, (which is not to be supposed) yet that ought not to affect the Appellee, who could not prevent his being tried.

It is in the next Place to be considered, whether the Court can delay the allowing of Clergy, to a Prisoner convicted of a Crime within the Benefit of it. And if the Court should respite the Allowance of Clergy, what the Consequence would be.

The Court ought not to delay the Party having the Benefit of his Clergy; for it is his Right, if he be capable of it *. *Hob.* 289. *Searle* against *Williams*. First, it may

* Though the Judges made it a Rule not to admit any one to Clergy, until after he had pleaded; yet I find it no where holden that a Man could not legally demand it until called to Judgment: Nor doth the Opinion to the Contrary, in the principal Case, grounded on the Authority in Hobart, seem to be at all made out by that Case. 2 Hawk. 536.

not

not be improper to enquire how his Right of having Clergy did commence. Secondly, how Laymen came to be entitled to it. This Right began by an Encroachment of the Pope upon the Temporal Power, in the Behalf of the Clergy; whom the Pope by his Eccleſiaſtical Conſtitutions did as much as in him lay, exempt from the Juriſdiction of Lay Judges. Therefore, though the whole Body of the Clergy ſtood upon it, as appears by St. *Ar' Cler' C.* 15. that *Clericus coram Seculari Judice judicari non debet* in caſe of Life or Member; yet the Temporal Courts did not wholly yield to this Impoſition, but only in Part, and qualified it in a great Meaſure. 2 Hawk. 474. 2 Inſt. 633.

1. They would indict Clerks for Felonies and Crimes, as well as others, and proceed thereon, until the Ordinary did demand them. And if the Ordinary would not demand them, antiently, the King's Courts took no Notice of them; but would proceed to Conviction, Attainder and Execution. And if the Ordinary did claim Clerks before Conviction, then an Inquiſition was taken, whether the Party was Guilty or not, *ut ſciatur qualis Ordinario deliberatur*, and if acquitted, diſcharged; but if found Guilty, then delivered to the Ordinary, who was to proceed to Purgation. This Privilege ſo reſtrained and ordered, was confirmed and eſtabliſhed by the Statute of *W.* 1. *cap.* 2. and thereby became an undoubted right to all Clerks; which was confirmed and allowed by divers Acts of Parliament ſince. But then the Ordinary was to proceed to deprive the Clerk of his Character, if he could not purge, whereby he became a meer Layman: For though at firſt the Clergy never intended that any ſhould have that Privivilege, but thoſe who were in Holy Orders; yet afterwards they extended it to thoſe who were not ſtrictly in Orders, but were Aſſiſtants to them in doing Divine Offices. See *Linwood* 92. That they ſhould have the Privilege of Clergy, who had but *primam tonſuram*, which for the Purpoſe was the Clerk that ſung or ſet the *Pſalm*, who was comprehended under the Word *Clericus*, *Linwood* 17. So was the Door-keeper of the 2 Hawk. 504.

Church or Chapel, the Reader, Exorciſt, Sub-Deacon, which becauſe the Temporal Courts did not readily allow, occaſioned the Complaint of the Clergy, as appears by the Statute in 25 *E.* 3. *cap.* 4. That *Clerks Seculars*, &c. had been drawn and hanged, by the award of ſecular Judges; in prejudice of the Franchizes, and in Oppoſition to the Juriſdiction of Holy Church. Therefore it was granted by the King, that all manner of Clerks, as well ſecular as Religious, which ſhould be convicted before ſecular Juſtices, ſhould have that Privilege; which Word Clerk in that Statute hath reference to the Canon Law, and being made to eſtabliſh a Privilege claimed thereby was expounded by it, which included all that were of thoſe inferior Orders. And from thence it is to be obſerved, Occaſion was taken in after-times to alter the Method of allowing Clergy, for at the Common Law, if the Party had not demanded his Clergy before Conviction, he loſt it, *St. P. C.* 151. *Priſot* Chief Juſtice of the *Common* 1 Hawk. 504. *Pleas* in the Time of *H.* 6. made an Alteration, and would direct the Party indicted or appealed to anſwer to the Felony, and after Conviction upon his own Demand allow him his Clergy, which Courſe has been ever ſince obſerved, being grounded upon the ſaid Statute of 25 *E.* 3. *cap.* 4. that allows it to Clerks after Conviction.

2 Hawk. 474. Now the next enquiry will be how mere Laymen, who had no Relation to any Eccleſiaſtical Employment came to enjoy this Privilege. It is to be known that in thoſe Days few were bred to Literature, but thoſe who were actually in Orders, or educated for that Purpoſe. And therefore the way of Trial whether one was a Clerk or not was by reading, of which the Court was Judge, and not the Ordinary; for if he could not read, the Court would not deliver him as a Clerk, though the Ordinary did claim him. And if he did read, he ſhould be allowed as a Clerk, though the Ordinary refuſed him. See *St. Pl. C.* 131, 132. where the Books are quoted, the variety of Opinions conſidered, and the Law ſettled. And reading being

being the Way of Trial, whether a Man were a Clerk or not, without further Examination into any other Qualification, all Persons that so approved themselves by reading were allowed to be Clerks, which is an equitable Construction of those Statutes, that established and extended that Privilege, because they were tried and found by their reading to be Clerks.

And further, the allowing Clergy to Lay-men that could read, seemed very much in Favour of the Clergy, in preserving its Succession, by exempting such who were capable of receiving any Orders, when there was occasion for their Service: For though Men were never so well qualified for being Clergymen; yet by the Canon Law, which is still in Force, they were not to receive any Orders, until a Place was provided for them; which favourable Construction of the Statutes in not confining the Benefit of Clergy to those who were actually in Orders, but who were capable of them, received constant Approbation and Allowance. See 4 *Hen.* 7. *cap.* 13. that enacts, that every Person not being within Holy Orders, that once had the Benefit of his Clergy, should not be admitted to it any other Time. And the like Act was made 4 *Hen.* 8. which for Murders, Robberies *&c.* excludes all Persons from the Benefit of his Clergy, (Clerks in Holy Orders excepted;) which gave much Offence to the Clergy, because the Construction of the Words Holy Orders, was confined to the greatest Orders, as Deacon and Presbiter, excluding not ony Lay-men, but all the inferior Orders, whose Orders are not accounted sacred. See *Linwood* 92. for they had only *primam Tonsuram*, which caused the Abbot of *Winchomb* in his Sermon at *Paul's Cross* to inveigh against that Act; and to avoid the Force of it against those of the inferior Orders, the Clergy insisted, that *tam minores quam majores Ordines fuere sacri.* See *Keil* 180. the whole Debate of that Matter *. 2 Hawk. 474.

That Lay-men, that could read, ever had the Privilege of Clergy since 25 *E.* 3. doth appear without contradic-

* Pl. 5.

tion

tion by our Books, which allowance never was condemned in Parliament, or complained of as a Grievance; but rather approved of. And the Statute of 18 *Eliz.* being made, extends to all Persons, that at that Time were admitted to the Ordinary; whereby every Person, as well Lay, as Spiritual, hath a right to the Benefit of that Statute for the first Offence, in the same Degree as Clergymen in the greatest Orders had before. The Statute enacts that:

2 Hawk. 510. 1. One that shall be admitted to the Benefit of his Clergy, (which is, every one that demands it and Reads) shall not be delivered to the Ordinary: But after reading, and burning in the Hand shall be delivered; which amounts to, and hath the same effect as a Purgation before. *Vide* 5 *Rep.* 115. *Foxley's Case.*

2 Hawk. 508. 2. If the Offence be heynous, the Court in Discretion may inflict any other Punishment, not exceeding a Year's Imprisonment; whereby there is no room left for the Court to exclude him from the Benefit of his Clergy, upon which his Discharge depends. And if it be so heynous, the Court ought to proceed regularly and give him that additional Punishment, that the Law doth direct after Clergy had. So that the Court is bound up to that Manner of Proceeding, which the Statute had prescribed; but to remand to Gaol without doing either, is without any Warrant, Rule or Method in Law, and contrary not only to 18 *Eliz.* and 3 *Hen.* 7. but to the 25 *Ed.* 3. In the recital whereof, complaint was made that Clerks being attainted, were remanded to Gaol upon a Suggestion that other Matters were against them; yet the Law was, that those Clerks should not be remanded to Gaol, but presently arraigned of all against them, otherwise immediately delivered to the Ordinary, so that he ought not to be kept longer than the same Session or Gaol Delivery, though he was indicted for other Crimes. *Vide St. Pl. C.* 152.

1. It

It is not enough to say, *That where there is an absolute Acquittal, he should be liable to the Appeal, therefore much more where he is convicted of Manslaughter, and acquitted of the Murder;* For *first*, the Statute 3 *H.* 7. makes him liable in the one Case, and exempts him in the other. 2 Hawk. 535.

2. In many Cases a Conviction and having Clergy conduces more to the Safety of the Prisoner than an Acquittal; for if the Prisoner were convicted and had his Clergy, he was thereby discharged of all Crimes committed before Clergy had, until 8 *Eliz.* But if he had been acquitted, he was liable to answer for any others committed before his Acquittal, *Dyer* 214*. 1 *And.* 114‡. And though the Clergy be taken away from Murder, with which he is charged in the Appeal, yet that makes no Alteration; for Manslaughter is the same Offence, only differing in Circumstance and Degree; and at the Time of the making the Statute of 3 *H.* 7. Clergy might be had for the one as well as the other; and the subsequent Statutes of 23 *H.* 8. and 1 *Ed.* 6. have not that Effect as to hinder him from having his Clergy for any Offence for which he was not excluded from it. For it would be very strange that the 23 *H.* 8. *c.* 1. and 1 *Ed.* 9. *c.* 12. should have those Consequences, *first*, by taking away Clergy for Murder, to hinder one from the Enjoyment of it that is only found guilty of Manslaughter, though appealed of Murder; and *secondly*, to put a Man upon another Trial for his Life, when he was before in Danger of it, which is contrary to the Maxim of the Common Law. 4 *Rep.* 45. *Vaux's Case.* 2 H.P.C. 535. Holcroft's Case. 4 Rep. 46. Co. Ent. 55. 3 Inst. Cap. 57. 2 Hawk. 535.

3. To suspend the Allowance of Clergy, is to take away a Man's Defence, whereby he might prevent the being convicted of Murder, which Conviction deprives him of his Clergy; for, notwithstanding these Statutes of 23 *H.* 8. and 1 *Ed.* 6. if a Man had been convicted of another Manslaughter or Larceny, and had his Clergy, he might have pleaded that Conviction and Allowance of Clergy in Bar of an Appeal or Indictment of another

* Pl. 48, 49, 50. Stone's Case.
‡ Pl. 158.

Murder

Murder committed before Clergy had, though ousted of Clergy if convicted, *Dyer* 214. and 8 *Eliz.* The recital of the Statute shews that the Law was so, till altered by that Statute, which by no Construction can extend to this Case, because it is the same Offence.

2 Hawk. 537. The Statute of 3 *H.* 7. is severe in overthrowing a Fundamental Point in Law, in subjecting a Man that is acquitted, to another Tryal, which is putting his Life twice in Danger for the same Crime; therefore the Purview of 3 *H.* 7. ought to be taken strictly, and the Exception favourably.

1. Because that Exception preserves the ancient Right that a Man had, and the Benefit of Clergy hath been always extended upon the Construction of any Act of Parliament made for the Preservation of it: Therefore the Construction 25 *E.* 3. is, *that as soon as ever a Man is recorded to have read, he is immediately the Ordinary's Prisoner, though remanded to the Gaol, and the Temporal Court hath nothing more to do with him.* St. Pl. Cor. 102.

2. It is such a Privilege, of which no general Words in an Act of Parliament have been construed to deprive an Offender: Therefore, if a Fact be made Felony by a Statute wherein are these express Words, *viz. That the Offender shall suffer Pains of Death*, as in the Statute of 1 *Jac.* for *Polygamy*, &c. yet the Offender shall have his Clergy. *Vide* 3 *Inst.* 73. and many other Instances*.

3. Though the Appeal be attached in the Appellant, yet the Conviction of Manslaughter upon an Indictment, pending the Appeal, and Clergy allowed, will be a good Bar thereunto. *Vide* 4 *Rep.* 74. *Wrote* and *Wigg*, which hath these Words, *viz. If before Plea pleaded he hath his Clergy*, &c. which must have this Construction, *viz. If the Appeal be in the same readiness to be tried as the Indictment, then it ought to be preferred to it; but if not, the Indictment may be proceeded upon, and the Conviction of Manslaughter with Clergy will be a good Bar to the Appeal.*

3 Inst. 131. S. C.

2 Hawk. 535.

* Stone's Case, ubi sup.

4. It

4. It is fit to consider what the Consequence would be to the Defendant in Appeal of Murder, if he had been convicted of Manslaughter, and the Court should not call him to Judgment, whereby he could not have the Opportunity of demanding the Benefit of his Clergy, which he is not to have without demanding it, *Hob.* 189. *Searl* and *Williams*, or at least if he demanded the Benefit of his Clergy, and no Record made of it: * *First*, it would be an apparent Injury done to the Public Justice of the Kingdom, in not proceeding to Judgment upon a Conviction, unless there be some reason in point of Law appearing upon that Record of Conviction that may justify the Court to advise and consider. 2*dly*, It would be a great absurdity to try a Man in order to hang him, and yet if the Verdict be such that he may be saved, he shall be deprived of the Advantage thereof, which is to subject the Life of a Man to the arbitrary Disposition of the Court, though there be a Law by which he might be saved. But this delay of the Court shall never turn to the Damage of the Prisoner; for if he be a Person capable of having his Clergy, he may plead the Conviction of Manslaughter upon the Indictment, and that he was a Clerk, and was ready to have prayed his Clergy in Bar of the Judgment, and that the Court, without giving him an opportunity to demand his Clergy, did remand him to Goal; for the Delay or Doubt of the Court, notwithstanding there might be Cause of Doubt concerning it, shall not prejudice the Party, 4 *Rep.* 45, 46. *Burgh* and *Holcroft*'s Case is full in Point: There the Party was called to Judgment, and did pray his Clergy, but the allowance thereof was respited by the Court upon a *Curia advisari vult*; yet it was as effectual to him, and allowed to be as good a Plea in Bar to an Appeal of Murder as if it had been allowed to him, because the respiting of it was the act of the Court. It would be wonderful strange, that the delay of the Court in one Case shall not be a damage of the Party, and in the other it should. The not calling him to Judgment is as much the delay of the Court in one Case, as the respiting the Clergy in the other; both are as much without the Letter, and within the same Equity of the saving in the Statute.

2 Hawk. 536.

Co. Ent. 554 S. C.

* This Opinion grounded on the Authority of *Searl*'s Case, does not seem to be at all made out by that Case. 2 Hawk. cap. 36. s. 14. p. 536. and the reasoning contained in that Section of Hawk. is sanctified by the Approbation of Lord Mansfield. 5 Bur. 2801.

Theſe Matters ſeem to make this point very clear; and being ſo obvious, it is a great wonder that ever any queſtion ſhould be made of it; yet it is moſt certain that *Toothill*, *Yardly*, *& al'*, were in 18 *Car.* 9. tried in *Kent* before the Lord Chief Juſtice *Bridgman* for a Murder, and convicted of Manſlaughter, and he refuſed them the Benefit of Clergy; upon which an Appeal was brought in the King's Bench, and the party pleaded *Not Guilty*, and were tried again, *Kelyng* then Chief Juſtice, *Twiſden*, *Wyndham*, and *Morton*, Juſtices. Whether they were acquainted, with the deferring to proceed to Judgment at the Aſſizes, and did approve of it, doth not appear.

1 Sid. 316.
2 Kib. 141. 3. S. C.

Since then there have been divers other Caſes, which in the laſt Reign were reſolved by all the Judges of *England*, *That the Court might delay the calling the Convict to Judgment, to hinder him from praying his Clergy; eſpecially if any Appeal were depending before it was allowed, in order to make the Defendant liable to the Appeal.* One was the Caſe of *Goring* and *Deering*, where the Defendant pleaded his Conviction of Manſlaughter upon an Indictment, *That he was a Clerk, and ready and deſirous to have his Clergy, if the Court would have called him to his Judgment.* That Plea was over-ruled, and upon his Plea over, *Not Guilty*, he was tried before me, *Paſch.* 1 *W. & M.* at *Niſi Prius* in *Middleſex*, and again convicted of Manſlaughter, and the burning of his Hand was pardoned. I did not hear the Reaſons of that Judgment, but I ſuppoſe that Precedent of *Tothill* and *Yardley*, which was made by ſo great a Man as my Lord *Bridgman*, who poſſibly might do it only to have the Point ſolemnly ſettled and determined, and ſome other ſubſequent inſtances in purſuance thereof, did prevail: But notwithſtanding what had been ſo practiſed, and afterwards ſo ſolemnly reſolved, we did, upon the Reaſons before mentioned, reſolve, *That the Defendant Liſle's Plea to the Appeal was a good Bar*, and gave Judgment for the Defendant.

2 Hawk. 536. Trim. 15. 3 Mod. 156. Carth. 16. Comb. 89. 2 Show. 507. S. C.

From

From the Matter of this Debate may be drawn these four Conclusions:

1. If one be indicted for Murder, and thereupon convicted of Manslaughter, and the Court will not call him to Judgment, but continue him over to another Gaol Delivery, upon a *Curia advisare vult de Judicio, &c. if* an Appeal of Murder be brought, he may plead his Conviction, and his being a Clerk and ready to real if the Court would have allowed him.

2. When the Indictment and Conviction of Manslaughter and Appeal are removed into the King's Bench, that Court is bound *ex officio*, to call the party to Judgment, and if he pray his Clergy, to allow it to him, and order him to be burned in the Hand.

3. When at the same Sessions or Assizes there is an Indictment and an Appeal depending, it is most just to proceed upon the Appeal, if the Prosecutor desires it, and the Court in Justice is obliged thereunto; because the *Stat.* 3 *H.* 7. doth not forbid it, for the Words are, *That there shall be no tarrying for the Appeal;* but if the Appeal be ready, it ought to have the preference: Yet if the Court should proceed to try the Prisoner upon the Indictment, before he be tried upon the Appeal, and he be convicted of Manslaughter, and hath his Clergy, it will be a good Bar to the Appeal; for there may be a just Cause for the Court to prefer the Indictment to the Appeal; as, if the Court shall find that there is like to be a feint or a covenous Prosecution of the Appeal; in order to acquit the Party; for the Interest of the Crown, and the sake of Publick Justice, the Court ought to try the Prisoner upon the Indictment rather than upon the Appeal, for otherwise the Acquittal upon a feint Prosecution will conclude the King.

2 Hawk. 535. But vide 3 Inst. 131.

4. If upon an Indictment of Murder the Party is convicted of Manslaughter, and immediately after, at the same Gaol Delivery, the Wife or Heir of the deceased

ceaſed ſhall put in an Appeal, it is moſt juſt for the Court to call the Convict to Judgment upon the Indictment, and to allow him his Clergy, before he be put to anſwer to the Appeal, and then he may plead the Conviction and Clergy in Bar of the Appeal; for though it be the ſame Seſſions, and the Appeal hath relation to the firſt Day of the Seſſions as well as the Indictment, yet there being a Record of a proceeding upon the Indictment it is pleadable in Bar, and may be averred to be the ſame Day before the Appeal commenced; or if the Appeal be commenced before the Trial, if it appears to the Court the Conviction was before Plea pleaded to the Appeal, it is ſufficient: For, ſuppoſe a Man is indicted of Murder, and tried, and convicted of Manſlaughter, or acquitted, and at the ſame Seſſions or Aſſizes there is a Coroners Inqueſt, he may plead his former Acquittal or Conviction in Bar of the other; though the Courſe now uſed to prevent that Trouble, is to charge the Jury with both Inquiſitions at the ſame Time, yet anciently it was otherwiſe; and if the Court will not allow the Convict of Manſlaughter his Clergy, he may inſiſt upon it before he anſwers to the Appeal.

Note, *Theſe Reaſons were not ſolemnly delivered in Court, but afterwards were put in order and form by the Chief Juſtice.* *

* Sir John Holt who was the original Editor of theſe Reports.

TERM. PASCH.

13 W. 3.

Rex verſus *Plummer.*

12 Mod. 627. S. C.

Coram Rege inter placita Coronæ Rot. 25.

PLUMMER the Priſoner was indicted at the Aſſizes held for the County of *Kent*, 29*th* of *July*, 18 *Will.* 3. The Indictment ſets forth that *John Glover*, and *Benjamin Plummer* the Priſoner, and others, 13 *March* 12 *Wil.* 3. did of Malice forethought make an Aſſault upon *John Harding*, and that *John Glover* having a certain Fuzee in his Hand charged with Gunpowder and Bullet, did felonioufly, voluntarily and of his Malice forethought, diſcharge the ſame againſt the ſaid *John Harding*, and thereby gave him a mortal Wound of which he inſtantly died. And that *Benjamin Plummer* the Priſoner and others of their Malice forethought, did aid, abet and aſſiſt the ſaid *John Glover* in committing the Murder aforeſaid. *Benjamin Plummer* pleaded *Not Guilty*, and the Jury did find this ſpecial Verdict, *viz.*

That *Joſeph Beverton* was duly appointed to ſeize and apprehend all ſuch Wool of the growth of this Kingdom, that ſhould be carried to be tranſported into Parts beyond the Seas, and alſo all ſuch Perſons as ſhould carry the Wool in order to be tranſported. And that *Benjamin Plummer*, *John Harding*, and others whoſe Names are unknown,

unknown to the Number of eight Persons, the said 13 of *March* about 12 of the Clock at Night, about 7 Miles from the Sea, did load three Horses with eight Hundred Pounds of Wool of the growth of *England*, in order to transport it into France. And *Joseph Beverton* having Notice thereof, came with divers other Persons to his assistance, to a certain Lane about 7 Miles distant from the Sea, in order to stop and seize the Wool so intended to be transported, and placed themselves in divers Places about the Lane; and *Joseph Beverton* with his Company hearing the three Horses laden with Wool, pronounced a Watch Word agreed on between him and his Assistants; and thereupon all of them used their utmost endeavour to seize the Wool, whereupon one of the eight Persons in company with *Benjamin Plummer*, whose Name is unknown, did shoot off the Fuzee, and thereby did kill the said *John Harding*, being one of the eight Persons, and a Partner with them in the Design of transporting the Wool, of which Wound he died.

The Question is upon this special Verdict, Whether *Benjamin Plummer* be guilty of the Murder as charged in the Indictment, or so much as of the Death of *John Harding*.

To put the Case in as few Words as may be, so as to bring it to a Point, it is no more than this. Eight Persons had loaded a quantity of Wool to carry it to be transported; of which the King's Officers having Intelligence, did in the Night time, as they were carrying the Wool, meet to oppose, and to apprehend them, and they met in a Lane, and upon a Watch Word given by the King's Officers, one of the eight Persons shot off a Fuzee, and killed another of the eight Persons, whether the others of the Eight (besides him that shot off the Gun) be guilty of the Murder of the Person slain?

Upon

Upon this Question all the Judges have been consulted, and we are all of Opinion, that *Benjamin Plummer* is not guilty of the Murder of *John Harding*. The Reasons of the Judgment were given by the Chief Justice.

1. It doth not appear by the finding of this Special Verdict, that *Glover* or the Person unknown that shot off the Gun, did discharge it against any of the King's Officers but it might be for ought appears for another Purpose; though upon the particular circumstances in the special Verdict, there is an Evidence that the Gun was discharged against the King's Officers, and so it might reasonably be intended, considering they were all armed, and in Prosecution of an unlawful Act in the Night, which they designed to justify and maintain by Force; especially when the Gun was shot off upon the Watch Word given, the King's Officers were endeavouring to seize the Wool; the Jury thereupon might well have found that the Fuzee was discharged against the King's Officers; but since they have not found that Matter, we are confined to what they have found positively, and are not to judge the Law upon Evidence of a Fact, but upon the Fact as it is found. 2 Hawk. 627.

Therefore it is fit to consider in this Case, 1. What Crime it is in the Party that shot off the Gun that killed *Harding*.

2. How far the rest of his Company that were with him shall be concerned in the Guilt of it.

1. He was upon an unlawful Design, and if he had in pursuance thereof discharged the Fuzee against any of the King's Officers that came to resist him in the Prosecution of that Design, and by Accident had killed one of his own Accomplices, it would have been Murder in him. As if a Man out of Malice to *A.* shoots at him to kill him, but misses him and kills *B.* it is no less a Murder than if he had killed the Person intended. Foft. 261.

Dyer

Dyer 128.* *Cromp.* 101.‡ *Plowden's Com.* 457. *Saunder's Case*, 9 *Rep.* 91. *Agnes Gores's Case.*

But 2. It not appearing that he discharged his Fuzee against the King's Officer, it may be that he discharged it either out of some Provocation from *Harding*, or wilfully out of some precedent Malice against him.

1. It seems to me hard upon a special Verdict to construe that the Fuzee went off by Accident, but it must be understood to be voluntary; though even in any Indictment for Manslaughter it is requisite that it should be averred that he discharged it voluntarily; but in a Verdict it need not be so alleged, but the saying he did it must be understood to be with, and not against his Will; for where any one upon any killing of a Man is to be discharged by an involuntary killing, it must be so found, without which it must be understood to be voluntary; for a Man being a free Agent, if he be found to do any Act, it must be supposed to be with his Will, unless it be specially, and particularly found to be against his Will. Therefore when a Man is indicted for a voluntary killing, if he did kill the Man by misadventure, the special Circumstances of the Case must be found, that it may appear
12 Mod. 628. to the Court to be by accident.

12 Mod. 629. 2. But in the next Place, suppose that he that shot off the Fuzee did it out of Malice prepensed against the Person slain, whereby it would be Murder in him. Then the Question will be, whether the rest of his Accomplices shall be adjudged to be principals to him, as Aiders, Abettors or Assisters to that Murder. And we all held that they would not be Principals: For though they are all engaged upon an unlawful Act, and while they were actually in it, this Murder is committed by one of the Company so engaged, yet it does not appear to be done
Hawk. 128. in not. in Prosecution of that unlawful Act, but it may be upon another Account, and those who are in the unlawful Act, not knowing of the Design that killed the other his Companion

* Pl. 60. ‡ Pl. 474.

panion cannot be Guilty of it. This Notion that hath been received, that if divers Persons be engaged in an unlawful Act, and one of them kills another, it shall be Murder in all the Rest, is very true; but it must be admitted with several Qualifications. First, the Abettor must know of the malicious Design of the Party killing; as for the Purpose *A.* and *B.* having Malice engage in a Duel, *C.* a stranger, of a sudden takes part with *A.* who kills *B.* it is but Manslaughter in *C.* because he knew not of the Malice, though it be Murder in *A.* 14 *Jac.* Sir *Ferdinando Cary's Case*, *Plo. Com.* 101. *Crom.* 23.

If divers Men lie in wait to beat a particular Person, and one of them, while they are in Prosecution of that unlawful Design, out of Malice he had to another of his Companions, finding an Opportunity, kills him, the Rest are not concerned in the guilt of the Fact.

At the Sessions at the *Old Baily*, *December* 1664. The Case upon the Evidence was, that the Secretary of State made a Warrant to apprehend divers suspected Persons, which was directed to a Messenger, who having Notice that they were in an House, desired several Soldiers to assist him in the apprehending of them, but in the doing thereof they broke open the Doors, and some of the Soldiers stole some Goods. It was held that the Warrant then produced was not sufficient to break open the Doors of the House without a Civil Officer. Secondly, though the breaking open the Door was an unlawful Act, of which all were guilty; yet was it Felony only in those that stole the Goods, or knew of the Design of stealing, and consented to it; but not in the others that were concerned in breaking open the Doors: No more in this Case can the Rest of the Company be said to be guilty of the killing of *Harding*, unless they knew of the Person's Design to kill him.

2. The killing must be in pursuance of that unlawful Act, and not collateral to it. As for the Purpose, if divers come to hunt in a Park, and the Keeper com-

mands them to ſtand, and reſiſt them; if one of the Company kills the Keeper, it is not only Murder in him, but in all the Reſt then preſent, that came upon that Deſign, for it was done in purſuance of the unlawful Act, 2 *Roll* 120. *Palm.* 35. the Caſe of *Wormal* and *Triſtram*, and in the other Books before referred to. Lord *Dacre's Caſe*, *Moor* 86.

But ſuppoſe that they coming into the Park to hunt, before they ſee the Keeper, there is an accidental Quarrel happens amongſt them, and one kills the other, it will not be Murder but Manſlaughter; and in the Reſt that were not concerned in that Quarrel it will not be Felony. So if one kills his Companion upon a former Malice, the others will not be concerned in it, therefore cannot be Abettors becauſe ſtrangers to the Deſign. And that for ought appears might be this Caſe, for my Brother *Gould* that tried this Cauſe informs us, that there was ſome Reaſon to believe that he that diſcharged the Fuzee againſt the Perſons ſlain, did it upon the account that he conceived that the other had betrayed their Deſign; and no doubt it was Murder in him that ſhot off the Fuzee, but not in the others unleſs privy to his Purpoſe, for it was not done in Proſecution of that unlawful Act; but if he had ſhot off his Gun againſt the King's Officers, and by accident had killed one of his own Party, all the Reſt of them would have been Abettors and Principals.

Dyer 128. *p.* 60. This Caſe is put, *A.* and *B.* are fighting together out of Malice prepenſed, *C.* comes to part them, and *A.* kills *C.* this is Murder in *A.* and ſome ſaid in *B.* alſo, but the major Number were of a contrary Opinion; for though *B.* was engaged in an unlawful Act as well as *A.* yet the killing of *C.* by *A.* was not in purſuance of, but collateral to it, but the killing of *C.* by *A.* was Murder, becauſe he killed one doing his Duty which was endeavouring to keep the Peace; and would have hindered him from killing *B.* againſt whom he had Malice.

3 There

3. There is another Qualification of this Rule, that the doing an unlawful Act whereby a Person is slain shall make the killer to be a Murderer, is, that the unlawful Act ought to be *deliberate*. For if it be sudden, as upon an Affray that suddenly falls out, and the Parties are divided amongst themselves and fall to fighting, and one kills the other it is but Manslaughter. So if upon a sudden Affray the Constable or other Person comes to keep the Peace, and some knowing him to be the Constable or Person coming to keep the Peace shall kill him, it is Murder in him and all that assisted him in the doing of it; but in others that continue the Affray, and knew not that the Constable, or other Person was coming to keep the Peace, it will be no Crime: For first, though the Constable did not keep the Peace, it is necessary that the Parties engaged in the Tumult have Notice that he comes for that Purpose, otherwise the killing him will not be Murder, but only Manslaughter in him that kills him, and in consequence no Crime in the Person that did not know him to be there, and did not contribute towards his death. At the *Sessions* after *Hillary Term*, 19 *Car.* 2. *Thompson* and his Wife were fighting together in the House of *Allen Daws*, who seeing them fighting, came in and endeavoured to part them, thereupon *Thompson* thrust away *Daws*, and threw him down upon an Iron in the Chimney which broke one of his Ribs, of which he died; this upon a special Verdict was held to be only Manslaughter, though the Peace was broke, and the Person slain came only to keep the Peace; and it is the same if he had been Constable. But then it was resolved, that if the Constable or other Person come to keep the Peace be killed, it is necessary that the Person that kills him do know, or be acquainted that he came for that Purpose. Therefore he ought to charge them in the King's Name to keep the Peace, for otherwise the Party fighting may think he cometh in aid of the other with whom he is fighting. And *Mackally*'s Case doth not oppose this, but agrees with it in the Reason there given,

1 Hawk. 127, Foſt. 316, 311, Ld. Raymond 1296.

Ante, 66. Foſt. 272.

Foſt. 135. 311.

9 Co. 65. Cro Jak. 279. Hugh Ent. 144.

which is in these Words, *viz.* When an Officer or Minister of the King arrest another in the Name of the King, or requires the breakers of the Peace to keep the Peace in the King's Name; if any notwithstanding resist and kill the Officer, it is Murder; but if he had not Notice that it was the Officer, it is only Manslaughter in him that killed; but then by the same Reason the others that are in the Affray, which was sudden, did continue in the Affray, but did not resist the Constable, it cannot be Murder or Manslaughter in them, for their Act cannot be extended farther than a breach of the Peace.

Fost. 351. But suppose the Riot or the Assembly had been deliberate, and they designed doing an unlawful Act, in which they are opposed by the Constable or any other Person, and one kills the Person opposing, it is Murder in all, *Moor* 87. *Dyer* 138. but more distinctly put in *Lamb.* 234. *George* came with divers Persons in a riotous Manner to the House of *B.* upon the Account of seizing some Goods, and using there some angry Speeches, a Kinswoman of them both travelling indifferently between them to appease them, was suddenly stricken in the Head with a Stone thrown over the Wall by one of the Servants of *George*, whereof she afterwards died, and by much the greater Opinion of the Judges and King's Council, it was held to be Murder in all the Accomplices; and though she came as a Stranger and was indifferent to all, yet they came with Malice against *B.* and in pursuance, and in Execution of that Riot the Woman was killed.

4. As the unlawful Act ought to be deliberate to make the killing Murder, so it ought to be such an Act as may tend to the hurt of another either, immediately, or by necessary Consequence. If Persons are in a Riot, and go with offensive Arms, or with Clubs and Staves, and in that Riot one of the Company kills another, it is Murder in him, and in all the Rest that are engaged in the Riot, though but lookers on, *Dal.* 280. *Br. tit. Corone*

Corone 171. *St. Pl. C.* 40. *Hale** 51, 57. But if such unlawful Act doth not tend immediately, or by necessary Consequence to the Danger of another, though Death ensue hereby, it is but Manslaughter.

Shooting at a Deer in another's Park is an unlawful Act: If the Arrow glanceth and kills a Man, this is but Manslaughter, which is contrary to 3 *Inst.* 56. that holds it to be Murder: But Lord *Hale* 31.‡ saith it is but Manslaughter, and the rest of the Company will be Guilty, for they were all Abettors to the unlawful Act.

The Design of doing any Act makes it deliberate; and if the Fact be deliberate, though no hurt to any Person can be foreseen, yet if the Intent be felonious, and the Fact designed, if committed, would be Felony, and in pursuit thereof a Person is killed by Accident, it will be Murder in him and all his Accomplices. As for the Purpose, divers Persons design to commit a Burglary, and some of them are set to watch in a Lane to hinder any from going to the House to interrupt them, if any comes in their Way, and those that are to keep Watch, kill him, those that are sent to rob the House will be guilty of that Murder, though they do not commit the Burglary. 1 Hawk. 112. 1 Hawk. 162.

So if two Men have a Design to steal a Hen, and one shoots at the Hen for that Purpose, and a Man be killed, it is Murder in both, because the Design was felonious. So is Lord *Coke* 56.† surely to be understood, with that Difference, but without this Difference, none of the Books quoted in the Margin, which are 3 *Ed.* 3. *Corone* 354. 2 *H.* 4. 18. 11 *H.* 7. 23. do warrant that Opinion; nor indeed can I say that I find any to warrant my Opinion, but only the Reason is submitted to the Judgment of those Judges that may at any Time hereafter have that Point judicially brought before them. 1 Hawk. 117. ——— 126. Foſt. 258.

These Things I thought fit to mention, though some of them are not such Premisses from which the Conclusion

* Sum. ‡ Sum. † 3 Inst.

cluſion to this Matter in Queſtion may be drawn, yet they all tend to illuſtrate the Matter and Reaſon that we rely upon, which is, that though the Perſon that ſhot off the Fuzee againſt the Perſon ſlain did it maliciouſly, and ſo it would be Murder in him, yet the others not knowing of his Deſign againſt that Perſon cannot be adjudged to be Aiders and Abettors of that Murder.

Secondly, If it had appeared upon the Verdict that the Fuzee had been diſcharged againſt the King's Officer, and by accident *Harding*, one of the Company, had been killed, it would have been Murder in the Reſt, becauſe it was done in purſuance of that Deſign, which was deliberate, and in the Proſecution whereof Hurt and Miſchief might enſue; and their being together is an Evidence that they did intend to maintain their unlawful Deſign by Force, and that the ſhooting the Gun was againſt the Officer: But this Matter being only Evidence of it, it ought to have been conſidered by the Jury, but we as Judges cannot take Notice of it.

TERM.

TERM. HILL.

5 Annæ Reginæ

Regina verſus *Mawgridge.*

Holt. 484.
9 St. Tr. 61.
S. C.

In the Queen's Bench.

AT the Seſſions of the Peace held at *Guildhall*, *London*, on the firſt of *July*, in the fifth Year of the Queen, *John Mawgridge*, of *London*, Gent. was indicted, for that on the ſeventh of *June*, in the ſame Year, he did felonioufly, voluntarily, and of his Malice forethought, make an Aſſault upon *William Cope*, Gent. and with a Sword on the left Part of his Breaſt, near the left Pap, did him ſtrike and pierce, giving him thereby a mortal Wound, of which he the ſaid *William Cope* did inſtantly die. Which Indictment being delivered to the Juſtices of Goal Delivery for *Newgate*, he was arraigned thereupon, and pleaded *Not Guilty*.

The

The Jury found this Special Verdict.

That William Cope *was Lieutenant of the Queen's Guards in the* Tower, *and the principal Officer then commanding there, and was then upon the Guard Room; and that* John Mawgridge *was then and there, by the invitation of Mr.* Cope, *in Company with the said* William Cope, *and with a certain Woman of Mr.* Cope's *Acquaintance, which Woman* Mawgridge *did then Affront, and angry Words passed between them in the Room, in the presence of Mr.* Cope *and other Persons there present, and* Mawgridge *there did threaten the Woman; Mr.* Cope *did thereupon desire* Mawgridge *to forbear such usage of the Woman, saying that he must protect the Woman; thereupon* Mawgridge *did continue the reproachful Language to the Woman, and demanded Satisfaction of Mr.* Cope, *to the intent to provoke him to fight; thereupon Mr.* Cope *told him it was not a convenient Place to give him Satisfaction, but at another Time and Place he would be ready to give it to him, and in the mean Time desired him to be more civil, or to leave the Company; thereupon* John Mawgridge *rose up, and was going out of the Room; and so going, did suddenly snatch up a Glass Bottle full of Wine, then standing upon the Table, and violently threw it at him the said Mr.* Cope, *and therewith struck him upon the Head, and immediately thereupon, without any Intermission, drew his Sword, and thrust him into the left Part of his Breast, over the Arm of one* Robert Martin, *notwithstanding the endeavour used by the said* Martin *to hinder* Mawgridge *from killing Mr.* Cope, *and gave Mr.* Cope *the Wound in the Indictment mentioned, whereof he instantly died. But the Jury do further say, that immediately, in a little Space of Time, between* Mawgridge's *drawing his Sword and the giving the mortal Wound by him, Mr.* Cope *did arise from his Chair where he sate, and took another Bottle that then stood upon the Table, and threw it at* Mawgridge, *which did hit and break his Head; that Mr.* Cope *had no Sword in his Hand drawn all the While; and that after* Mawgridge *had thrown the Bottle, Mr.* Cope *spake not.*

not. And whether this be Murder or Manslaughter, the Jury pray the Advice of the Court.

A day being appointed for the Resolution of the Court, and the Marshal required to bring the Prisoner to the Bar, returned he was escaped; which being recorded, the *Chief Justice* gave the Opinion of the Judges in this manner:

This Record being removed into this Court, the Case hath been argued before all the Judges; and all of us, except my Lord Chief Justice Trevor, *are of opinion that* Mawgridge *is guilty of Murder.*

This hath been a Case of great Expectation.

This Distinction between *Murder* and *Manslaughter* only, is occasioned by the Statute of 23 *H.* 8. and other Statutes that took away the Benefit of Clergy from Murder committed by Malice prepensed, which Statutes have been the Occasion of many nice Speculations.

The Word *MURDER* is known to be a Term or a Description of Homicide committed in the worst Manner, which is no where used but in this Island, and is a Word framed by our *Saxon* Ancestors in the Reign of *Canutus* upon a particular Occasion, which appears by an uncontested Authority, *Lamb.* 141. In the Laws of *Edward* the Confessor: *Murdra quidem inventa fuerunt in diebus Canuti Regis, qui post acquisitam Angliam & pacificatam, rogatu Baronum Angliæ remisit in Daciam exercitum suum.* Thereupon a Law was made, *That if any* Englishman *should kill any of the* Danes *that he had left behind, if he were apprehended, he should undergo the Ordeal Trial to clear himself; and if the Murder were not found within eight Days, and after that a Month was given, then if he could not be found, the Ville should pay forty-six Marks, which if not able to pay, it should be levied upon the Hundred. Bracton* 120. agrees with this Account. 1 Hawk. 114. 1 H.P.C. 425. in notis.

Though this Law ceaſed upon the Expulſion of the *Danes*, yet *William* the Conqueror revived it for the Security of his *Normans*, as appears by his Laws, after he had confirmed King *Edward* the Confeſſor's Laws. And *Henry* 1. *anno primo Regni*, afterwards by his Law (as appears in the Addition to *Lambert*) eſtabliſhes, *That if a Man be found ſlain, he ſhould be taken to be* a Frenchman *if it was not proved that he was an* Engliſhman, *and the Country was bound to enquire whether the perſon ſlain was an* Engliſh-*man or a* French-*man*. Theſe Inquiſitions were taken before the Coroner, and returned to the Juſtices in *Eyre*, and if the Jury found him an *Engliſhman*, then the Country was to be diſcharged, which Law was called *Engliſhire*, and the Juſtices in *Eyre* were alſo bound to enquire thereof, until the Statute of 14 E. 3. which, as
P. C. 18 a. it is mentioned in *Stamford*, was aboliſhed.

Hereby a miſtake upon the Statute of *Marlebridge* is rectified, which is *cap.* 26. *Murdrum de cetero non adjudicatur coram Juſticiariis, ubi per infortunium adjudicatum eſt, ſed locum habeat Murdrum de interfectis per Feloniam tantum, & non aliter*. This was not made upon a Suppoſition that he that killed the Perſon ſlain by Misfortune ſhould be hanged, but only to explain, or rather to take off the Rigor of the Conqueror's Law, that the Country ſhould not be compelled to find out the Manſlaughter; or if he were found out, he ſhould not undergo the Penalty of that Law. For as the Law ſtood, or was interpreted before that Statute, if a Man was found to be ſlain, it was always intended. 1. That he was a *Frenchman*. 2. That he was killed by an *Engliſhman*. 3. That killing was Murder. 4. If any one was apprehended to be the Murderer, he was to be tried by Fire and Water, though he killed him by Misfortune; which was extended beyond Reaſon and Juſtice in favour of the *Normans*: but if an *Engliſhman* was killed by Misfortune, he that killed him was not in danger of Death, becauſe it was not Felony. For, ſaith *Bracton* (who wrote the latter-end of *H.* 3.) *fo.* 136. *He that killed a Man by*

by Misfortune was to be discharged. 5. If the Malefactor was not taken, then the Country was to be amerced. But by the Statute of *Marlebridge*, if it was known that the Person slain was a *Frenchman*, and was killed by Misfortune, then the Country should not be amerced if the Man-slayer was not taken, or if he were taken, he should not be put to his Ordeal Trial. This seems to be the true meaning of that Statute.

But, *secondly*, it will appear to a Demonstration, that before that *Statute*, he that killed an *Englishman per infortunium* was never in danger of Death; for this *Statute* of *Marlebridge* was made 52 *H.* 3. The *Statute* of *Magna Charta* was consummate 9 *H.* 3. and that supposes, *that every one imprisoned for the Death of a Man, and not thereof indicted, might of Right pursue the Writ* de Odio & Atia; *and if it was found that the Person imprisoned killed him* se defendendo, *or* per infortunium, *and not* per feloniam, *then he was to be bailed.* Which shews that he was not in danger of Death; for if he had, he would not have been let to bail, 2 *Inst.* 42. *Coke* 9. 56. *Les Poulters Case*, *Register* 133. *b.*

1 Hawk. 5. in Notis.

Vide the Writ *de ponendo in Ballium*

Hereby I have given a true Account of the Sense of the Word Murder, that it was when (first in the Time of *Canutus*) a *Dane* and since (in *William* the Conqueror) when a *Frenchman* was killed; for as it was then supposed in the Time of *Canutus*, the *Englishmen* hated the *Danes* upon the Account of their Nation that had subdued them, and would upon Occasions seek their Destruction, as they did of a considerable Number of them in the Time of *Ethelred*, the *Saxon* King, that preceded *Canutus* next save one; so the Conqueror had the same Reason to suspect the Safety of his Normans.

After-

Afterwards, as appears by the Confessor's Laws, *Lamb.* 141. the secret or insidious killing of any other as well as a Foreigner was declared to be Murder. *Bracton* 120, 134, 135. Murder is thus defined, *Est occulta hominum extraneorum & notorum occisio manu hominum nequiter perpetrata.* With which agrees the other old Books of *Britton* and *Fleta:* Only in Case of a Foreigner it was penal to the Country; not of a Native.

Next, it may be necessary to shew what was to be understood by *Homicide* or *Manslaughter*. *Bracton* 120, 121. mentions the worst Part of it, which is a *voluntary Homicide*, defined in this Manner: *Si quis ex certa scientia & in assultu præmeditato, ira, vel odio, vel causa lucri, nequiter & in felonia, ac contra Pacem Domini Regis aliquem interfecerit:* If one knowingly, and by a premeditated Assault, by Anger or Hatred, or for Lucre-sake, should kill another, this was accounted *Manslaughter*; if it be done *clacnulo*, saith *Bracton*, it is *Murder:* That was all the Difference there was between the one and the other.

It appears, that since that of *Bracton* the Notion of *Murder* is much altered, and comprehends all *Homicides*, whether privately or publickly committed, if done by Malice prepensed. With this agrees *Stam. Pl. Cor.* 18. *b. At this day* (saith he) *a Man may define Murder in another Manner than it is defined by* Bracton, Britton *and* Fleta: *If any one of Malice prepensed doth kill another, be he Englishman or Foreigner, if secretly or publickly, that is Murder. This was the Definition long before the making of the Statutes of* 4 & 23 H. 8. *and the other Statutes that took away Clergy.* To define *Murder*, there must be *malitia præcogitata*, as also *murdravit:* So that if an Indictment be that the Party *murdravit:* and not *ex malitia præcogitata*, it is but Manslaughter. *Yel.* 204. 2 *Cro.* 283. 1 *Bul.* 141. *Bradly and Banks.* So if that be *ex malitia præcogitata*, omitting *murdravit*, it is but Manslaughter. *Dyer* 261. *Pl.* 26, 304. *Pl.* 56. *Vide Stat.* 10 E. 3. *cap.* 2. The Parliament complained

complained that Murderers, &c. were encouraged to offend, becauſe Pardons of Manſlaughters were granted ſo eaſily; the Act therefore prohibits the granting thereof. 13 *R.* 2. recites the ſame Miſchief and great Damage by Treaſons, Murders, &c. becauſe Pardons have been eaſily granted: Therefore the Act doth provide, *That if a Charter for the Death of a Man be alledged before any Juſtice, in which Charter is not ſpecified that he of whoſe Death any ſuch is arraigned was murdered or ſlain by Await, Aſſault or Malice prepenſed, it ſhall be enquired whether he was murdered or ſlain by Aſſault, Await, or Malice prepenſed; and if it be ſo found the Charter of Pardon ſhall be diſallowed.* This is a plain Deſcription of Murder, as it was taken to be according to the Common Underſtanding of Men.

Ever ſince the killing of a Man by Aſſault of Malice prepenſed hath been allowed to be Murder, and to comprehend the other two Inſtances. But becauſe the Way of killing by Poiſon did not come under the ancient Definition of *Bracton*, &c. which is ſaid to be *manu hominum perpetrata*, or of this Statute of 13 *R.* 2. Therefore by the Statute of 1 *E.* 6. *cap.* 12. It was enacted, That wilful poiſoning of any Perſon ſhould be accounted wilful Murder of Malice prepenſed. Foſt. 68.

One Thing more is fit to be obſerved, That in all Indictments for Murder a Man is not charged poſitively, that he did Murder the Perſon ſlain, but that he *ex malitia præcogitata, in ipſum inſultum fecit, ac cum quodam gladio*, he gave him a Wound whereof he died: *Et ſic ex Malitia præcogitata ipſum Murdravit*, ſo the Murder is charged upon him by way of Concluſion, and as a Conſequence from the antecedent Matter that is poſitively alledged. To come cloſe to a State of the preſent Queſtion, It doth appear that *Mawgridge* threw the Bottle at Mr. *Cope* without any Provocation given to him; for the Difference was between him and the Woman that was there in Company, and his Behaviour was ſo rude and diſtaſteful as did induce Captain *Cope* to deſire him to leave the

the Room, where he was only a Guest to him, and there by his Permission, this *Cope* might reasonably do, which could be no Cause to provoke *Mawgridge* to make the least Assault upon him; therefore I shall maintain these three Positions.

1. That in this Case there is express Malice by the Nature and Manner of *Mawgridge*'s throwing the Bottle, and drawing his Sword immediately thereupon.

2. That Mr. *Cope*'s throwing a Bottle at *Mawgridge*, whereby he was hit and hurt before he gave Mr. *Cope* the mortal Wound, cannot make any Alteration in the Offence by reducing it to be of so low a Degree as Manslaughter.

3. I shall consider what is such a Provocation as will make the Act of killing to be but Manslaughter only.

Fost. 256,257. 1. Here is express Malice, that appears by the Nature of the Action. Some have been led into mistake by not well considering what the Passion of Malice is; they have construed it to be a Rancour of Mind lodged in the Person killing, for some considerable Time before the commission of the Fact, which is a mistake arising from the not well distinguishing between Hatred and Malice. Envy, Hatred and Malice, are three distinct Passions of the Mind

1. Envy properly is a repining or being grieved at the Happiness and Prosperity of another, *Invidus alterius rebus macrescit opimis.*

2*dly*, Hatred, which is *odium*, is as *Tully* saith, *Ira inveterata*, a Rancour fixed and settled in the Mind of one towards another, which admits of several Degrees. It may arrive at so high a Degree, and may carry a Man so far

far as to wish the Hurt of him, though not to perpetrate it himself.

3*dly*, Malice is a Design formed of doing mischief to another; *cum quis data opera male agit*, he that Designs and useth the Means to do ill is Malicious, 2 *Inst.* 42. *Odium* signifies Hatred, *Atia* Malice, because it is Eager, Sharp and Cruel. He that doth a cruel Act voluntarily, doth it of Malice prepensed, 3 *Inst.* 62. By the *Statute* of 5 *Hen.* 4. If any one out of Malice prepensed, shall cut out the Tongue or put out the Eyes of another, he shall incur the Pain of Felony. If one doth such a Mischief on a suddain, that is Malice prepensed; for saith my Lord *Coke*, *If it be voluntarily, the Law will imply Malice.* Therefore when a Man shall without any Provocation stab another with a Dagger, or knock out his Brains with a Bottle, this is express Malice, for he designedly and purposely did him the Mischief. This is such an Act that is malicious in the Nature of the Act itself, if found by a Jury, though it be sudden, and the Words *ex malitia præcogitata* are not in the Verdict, 1 *Cro.* 131. *W. Jones* 198. *Halloway*'s Case, who was *Woodward* of *Austerly Park*: A Boy came there to cut Wood, whom by chance he espying, and the Boy being upon a Tree, he immediately calls to him to descend, which the Boy obeying, *Halloway* tied him to an Horses Tail with a Cord that the Boy had, then gave him two Blows, the Horse run away and brake the Boy's Shoulder whereof he died. This was ruled to be Murder by all the Justices and Barons, except Justice *Hutton*, who only doubted thereof; and that was a stronger Case than this, for there was some kind of Provocation in the Boy, who was stealing the Wood in the Park, of which *Halloway* had the Care; and it cannot be reasonably thought that he designed more than the Chastisement of the Boy, and the Horse running away in that Manner was a surprise to *Halloway*; yet in regard the Boy did not resist him, his tying him to the Horses Tail was an Act of Cruelty, the Event whereof proving so fatal, it was adjudged to be Malice prepensed,

1 Hawk. 126.
1 H.P.C. 454.
Palmer 585.

penſed, though of a ſudden, and in the heat of Paſſion. This Caſe is reported in *Jones* 198. *Pal.* 585. And there held, that the Court could determine it to be Malice prepenſed upon the ſpecial Matter found, *Crompton* 23. Two playing at Tables fall out in their Game, one upon a ſudden kills the other with a Dagger: This was held to be Murder by *Bromley* at *Cheſter Aſſizes*, 27 *Eliz.* So in this Caſe, if the Bottle had killed Mr. *Cope* before he had returned the Bottle upon *Mawgridge*, that would have been Murder without all manner of Doubt.

1 Hawk. 108, 109. In the ſecond Place, I come now to conſider whether Mr. *Cope*'s returning a Bottle upon *Mawgridge* before he gave him the mortal Wound with the Sword, ſhall have any manner of Influence upon the Caſe; I hold not.

Foſt. 178. Firſt, becauſe *Mawgridge* by his throwing the Bottle hath manifeſted a malicious Deſign. Secondly, his Sword was drawn immediately to ſupply the Miſchief which the Bottle might fall ſhort of. Thirdly, the throwing the Bottle by Captain *Cope* was Juſtifiable and Lawful; and though he had wounded *Mawgridge*, he

1 Hawk. 259. Sect. 23. 1. might have juſtified it in an Action of Aſſault and Battery, and therefore cannot be any Provocation to *Mawgridge* to ſtab him with his Sword. That the throwing the Bottle is a Demonſtration of Malice is not to be controverted; for if upon that violent Act he had killed Mr. *Cope* it had been Murder. Now it hath been held, that if *A.* of his Malice prepenſed aſſaults *B.* to kill him,

1 Hawk. 113. Foſt. 273. and *B.* draws his Sword and attacks *A.* and purſues him, then *A.* for his own ſafety gives back, and retreats to a Wall, *B.* ſtill purſuing him with his drawn Sword, *A.* in his defence kills *B.* This is Murder in *A.* For *A.* having Malice againſt *B.* and in purſuance thereof endeavouring to kill him is anſwerable for all the conſequences, of which he was the original Cauſe. It is not reaſonable for any Man that is dangerouſly aſſaulted, and when he perceives his Life in danger from his Adverſary, but to have Liberty for the ſecurity of his own Life, to

purſue

purſue him that maliciouſly aſſaulted him; for he that hath manifeſted that he hath Malice againſt another is not fit to be truſted with a dangerous Weapon in his Hand, *Dalt.* 292. *Hale* * 42. And ſo reſolved by all the Judges, 18 *Car.* 2. when they met at *Serjeants-Inn* in Preparation for my Lord *Morley*'s Trial, *Dalton* 272. If *A.* of Malice prepenſed, diſcharge a Piſtol at *B.* and then runs away, *B.* purſues him, and *A.* turns back, and in his own Defence kills *B.* it is Murder. This I hold to be good Law; for *A.* had a malicious Intent againſt *B.* and his retreat after he had diſcharged his Piſtol at *B.* was not becauſe he repented, but for his own ſafety. Foſt. 274, 5. 1 Hawk. 123. Ante, 53.

In a ſet Duel, there are mutual paſſes made between the Combatants, yet if there be original Malice between the Parties, it is not the interchange of Blows will make an Alteration, or be any Mitigation of the Offence of killing. Therefore I hold, if *Mawgridge* had thrown the Bottle at Mr. *Cope*, and Mr. *Cope* had returned another upon him and hit him, and thereupon *Mawgridge* had drawn his Sword and killed Mr. *Cope*, it would have been Murder. Some will ſay, that there is a difference between the Caſes, for that the Aſſault by the Piſtol, and the fighting a Duel was expreſs Malice, but this is only Malice implied. Surely there is no difference, for Malice implied is prepenſed, as much as if there had been a proof of Malice, or Hatred for ſome conſiderable Time before the Act; for the Stroke given, or an attempt made by Malice implied, is as dangerous as a Stroke given upon Malice expreſſed, therefore may be as lawfully reſiſted. This very point was alſo conſidered by the 12 Judges at *Serjeants-Inn*, and by them reſolved to be Murder upon the occaſion of my Lord *Morley*'s *Caſe*. When a Man attacks another with a dangerous Weapon without any Provocation; that is expreſs Malice from the Nature of the Act, which is cruel. The definition of Malice implied is where it is not expreſs in the Nature 1 Hawk. 122. Ante, 53.

* Sum.

of the Act; as where a Man kills an Officer that had Authority to arrest his Person: The Person who kills him in defence of himself from the Arrest is guilty of Murder, because the Malice is implied, for properly and naturally it was not Malice, for his Design was only to defend himself from the Arrest.

1 Hawk. 121, 2. 3. I come now to the third Matter proposed, which is to consider what is in Law such a Provocation to a Man to commit an Act of Violence upon another, whereby he shall deprive him of his Life, so as to extenuate the Fact, and make it to be a Manslaughter only. First, *Negatively* what is not. Secondly, *Positively* what is. First, No Words of Reproach or Infamy, are sufficient to provoke another to such a degree of Anger as to strike, or assault the provoking Party with a Sword, or to throw a Bottle at him, or to strike him with any other Weapon that may kill him; but if the Person provoking be thereby killed, it is Murder.

In the Assembly of the Judges, 18 *Car.* 2. this was a Point positively resolved. †

Therefore I am of Opinion, that if two are in Company together, and one shall give the other contumelious Language (as suppose *A.* and *B.*) *A.* that was so provoked, draws his Sword and makes a pass at *B. B.* (then having no Weapon drawn) but misses him. Thereupon *B.* draws his Sword and passes at *A.* And there being an interchange of passes between them, *A.* kills *B.* I hold this to be Murder in *A.* for *A*'s pass at *B.* was malicious, and what *B.* afterwards did was lawful. But if *A.* who had been so provoked draws his Sword, and then before he passes, *B*'s Sword is drawn; or *A.* bids him draw, and *B.* thereupon drawing, there happen to be mutual passes: If *A.* kills *B.* this will be Manslaughter, because it was suddain; and *A*'s Design was not so absolutely to destroy *B.* but to combat with him, whereby he

Foſt. 295.
1 Hawk. 123.

† Lord Morley's Case, ante, 53.

he run the hazard of his own Life at the same Time. But if Time was appointed to fight (suppose the next Day) and accordingly they do fight; it is Murder in him that kills the other. But if they go into the Field immediately and fight, then but Manslaughter. Suppose upon provoking Language given by *B.* to *A.* *A.* gives *B.* a box on the Ear, or a little blow with a Stick, which happens to be so unlucky that it kills *B.* who might have some Impostume in his Head, or other Ailment which proves the Cause of *B*'s Death, this blow though not justifiable by Law, but is a wrong, yet it may be but Manslaughter, because it doth not appear that he designed such a Mischief. 1 Hawk. 125. Fost. 291.

2. Secondly, As no Words are a Provocation, so no affronting Gestures are sufficient, though never so reproachful; which Point was adjudged, 3 *Cro.* 779. *Wats and Brains*, in an Appeal of Murder. 1 Hawk. 124. 1 H.P.C. 454, 6. Noy. 171. S.C.

There having been a Quarrel between *A.* and *B.* and *B.* was hurt in the Fray; and about two Days after, *B.* came and made a wry Mouth at *A.* who thereupon struck him upon the Calf of the Leg, of which he instantly died. It was Murder in *A.* For the affronting him in that Manner was not any Provocation to *A.* to use that Violence to *B.* 1 Hawk. 123.

There hath been another Case which I fear hath been the occasion of some Mistake in the decision of Questions of this Kind, *Jones* 432. *D. Williams' Case*, he being a *Welsh-man*, upon St. *David's Day* having a Leek in his Hat, a certain Person pointed to a *Jack of Lent* that hung up hard-by, and said to him look upon your Countryman; at which D. *Williams* was much enraged, and took a Hammer that lay upon a Stall hard-by, and flung at him, which missed him, but hit another and killed him: He was indicted upon the Statute of stabbing. Resolved, he was not with that Statute, but guilty of 1 Hawk. 116. 1 Lev. 266, 255. Skinner, 668.

Manſlaughter at Common Law. I concur with that Judgment, that it is not within the Statute of ſtabbing, for it is not ſuch a Weapon, or Act that is within that Statute, neither could he be found guilty of Murder, but only of Manſlaughter, for the Indictment was for no more. But if the Indictment had been for Murder, I do think that the *Welſh-man* ought to have been convicted thereof, for the Provocation did not amount to that degree, as to excite him deſignedly to deſtroy the Perſon that gave it him.

Foſt. 261. 3. Thirdly, If one Man be treſpaſſing upon another, breaking his Hedges or the like, and the Owner, or his Servant, ſhall upon ſight thereof take up an Hedge-ſtake, and knock him on the Head; that will be Murder, becauſe it was a violent Act, beyond the Provocation, which is ſufficiently juſtified by *Halloway's Caſe*, who did not ſeem to intend ſo much the Deſtruction of the young Man that ſtole the Wood, as that he ſhould endeavour to break his Skull or knock out his Brains, yet uſing that violent and dangerous Action of tying him to the Horſe-tail, rendered him guilty of Murder.

If a Man ſhall ſee another ſtealing his Wood, he cannot juſtify beating him, unleſs it be to hinder him from ſtealing any more, (that is) that notwithſtanding he be forbid to take any he doth proceed to take more, and will not part with that which he had taken. But if he deſiſts, and the Owner Wood-ward purſues him to beat ſo as to kill him. It is Murder.

If a Man goes violently to take another Man's Goods, he may beat him off to reſcue his Goods, 9 *E.* 4. 281. *b.* 19 *Hen.* 6. 31. But if a Man hath done a Treſpaſs and is not continuing in it; and he that hath received the Injury ſhall thereupon beat him to a degree of killing. It is Murder; for it is apparent Malice; for in that Caſe he ought not to ſtrike him, but is a Treſpaſſor for ſo doing.

4. Fourthly,

4. Fourthly, If a Parent or a Master be provoked to a degree of Passion by some Miscarriage of the Child or Servant, and the Parent or Master shall proceed to correct the Child or Servant with a moderate Weapon, and shall by chance give him an unlucky stroke, so as to kill him; that is but a Misadventure. But if the Parent or Master shall use an improper Instrument in the Correction; then if he kills the Child or the Servant, it is Murder: And so was it resolved by all the Judges of the *King's Bench*, with the Concurrence of the Lord Chief Justice *Bridgman*, in a special Verdict in one *Gray's Case* found at the *Old Bailey* 10 *Oct.* 18 *Car.* 2. and removed into this Court. *Gray* being a *Smith*, *B.* was his Servant; he commanded *B.* his Servant to mend certain Stamps belonging to his Trade; afterwards he and his Servant being at Work at the Anvil, *Gray* asked his Servant whether he mended the Stamps, as he had directed him. But *B.* the Servant having neglected his Duty acknowledged it to his Master, upon which the Master was angry, and told him if he would not serve him, he should serve at *Bridewel*; to which the Servant replied, that he had as good serve in *Bridewel* as serve the said *Gray*; whereupon the said *Gray* took the Iron Bar upon which he and his Servant was working, and struck his Servant with it upon the Skull, and thereby brake his Skull, of which the Servant died. This was held to be Murder; yet here was a Provocation on a sudden, as sudden a resentment, and as speedy putting it in Execution; for though he might correct his Servant both for his neglect and unmannerliness, yet exceeding measure therein, it is malicious. Every one must perceive that this last is a much stronger Case than this at Bar.

Gray's Case, Vide ante. 64. and references there. Forst. 262. 1 H. P. C. 474.

1. First,

1. First, *Gray* was working honestly and fairly at his Trade, and justly calling to his Servant for an account of his Business; this Miscreant was in the actual violation of all the Rules of Hospitality.

2. Secondly, *Gray*'s Action was right, as to the striking his Servant by way of Correction; but the Error was in the Degree, being too violent, and with an improper Weapon. This of *Mawgridge* was with a Resolution to do Mischief.

3. Thirdly, he had not the least Provocation from Mr. *Cope*, until after he had made the first and dangerous Assault, and then pursued it with the drawing his Sword to second it, before Mr. *Cope* returned the other Bottle. But *Gray* had a Provocation by the disappointment his Servant gave him in neglecting his Business, and returning saucy Answer.

The like in obstinate and perverse Children, they are a great grief to Parents, and when found in ill Actions, are a great Provocation. But if upon such Provocation the Parent shall exceed the degree of Moderation, and thereby in chastising kill the Child, it will be Murder. As if a Cudgel in the Correction that is used be of a large size, or if a Child be thrown down and stamped upon. So said the Lord *Bridgeman* and Justice *Twisden*, and that they ruled it so in their several Circuits.

5. If a Man upon a sudden Disappointment by another shall resort violently to that other Man's House to expostulate with him, and with his Sword shall endeavour to force his Entrance, to compel that other to perform his Promise, or otherwise to comply with his desire; and the Owner shall set himself in opposition to him, and he shall pass at him, and kill the Owner of the House, it is Murder, 2 *Roll. Rep.* 460. *Clement* against *Sir Charles Blunt*, in an Appeal of Murder.

The

The Case was, that *Clement* had promised a Dog to *Sir Charles Blunt*; and being requested accordingly to deliver him, refused, and beat the Dog home to his House: At which *Sir Charles Blunt* fetched his Sword, and came to *Clement*'s House for the Dog. *Clement* stood at the Door, and refused his Entry. *Blunt* thereupon kills *Clement*. The Jury were merciful, and found this Fact in *Sir Charles Blunt*, to be but Manslaughter. *Dodderidge* was clearly of Opinion it was Murder. But the Lord Chief Justice was a little tender in his direction to the Jury. But *Rolls* makes this remark, that it was not insisted upon by the Appellant's Council, that *Clement* was in the defence of his House, and that *Blunt* attacked *Clement* to force in: It was without all question Murder, though of a sudden heat, for there was no Assault made by *Clement* upon him, nor upon any of his Friends, but all the violence and force was on *Sir Charles Blunt*'s side. 1 Hawk. 124.

Having in these particulars shewn what is not a provocation sufficient to alleviate the act of Killing, so as to reduce it to be but a bare *homicide*, I will now, secondly, give some particular Rules, such as are supported by Authority and general consent, and shew what are always allowed to be sufficient provocations.

1. First, If one Man upon angry words shall make an Assault upon another, either by pulling him by the Nose, or filliping upon the Forehead, and he that is so assaulted shall draw his Sword, and immediately run the other through, that is but Manslaughter; for the Peace is broken by the Person killed, and with an indignity to him that received the Assault. Besides, he that was so affronted might reasonably apprehend, that he that treated him in that manner might have some further design upon him. 1 Hawk. 125.

There

1 Hawk. 117, in Notes. 1 Hale 470. Styles 467. Quære if the Case be not also reported with some slight difference by Hale in 1 H. P. C. 470.

There is a Case in *Stiles* 467. *Buckner's Case*. *Buckner* was indebted, and *B.* and *C.* came to his Chamber upon the account of his Creditor to demand the Money. *B.* took a Sword that hung up, and was in the Scabbard, and stood at the Door with it in his Hand undrawn, to keep the Debtor in until they could send for a Bailiff to Arrest him; thereupon the Debtor took out a Dagger which he had in his Pocket and stabbed *B.* This was a Special Verdict and adjudged only Manslaughter, for the Debtor was insulted, and imprisoned injuriously without any Process of Law, and though within the words of the Statute of Stabbing, yet not within the reason of it.

2. Secondly, If a Man's Friend be assaulted by another, or engaged in a Quarrel that comes to Blows, and be in the vindication of his Friend, shall on a sudden take up a mischievous Instrument and kill his Friend's Adversary, that is but Manslaughter; so was the Case, 12 *Rep* 87. * If two be fighting together, and a Friend of the one takes up a Bowl on a sudden, and with it break the Skull of his Friend's Adversary, of which he died, that is no more than Manslaughter. So it is, if two be fighting a Duel, though upon Malice prepensed; and one comes and takes part with him, that he thinks may have the disadvantage in the Combat, or it may be that he is most affected to, not knowing of the Malice, that is but Manslaughter, *Pl. Com.* 101. *John Vaughan* and *Salisbury*.

Foft. 154.

3. Thirdly, If a Man perceives another by force to be injuriously treated, pressed, and restrained of his Liberty, though the Person abused doth not complain, or call for Aid or Assistance; and others out of Compassion shall come to his Rescue, and kill any of those that shall so restrain him, that is Manslaughter, 18 *Car.* 2. adjudged in this Court upon a Special Verdict found at the *Old Baily*, in the Case of one *Hugett*, 118 *Car.*

Vide ante. 59.

* Manslaughter.

Car. 2. *A.* and others in the time of the *Dutch* War without any Warrant impreſſed *B.* to ſerve the King at Sea. *B.* quietly ſubmitted and went off with the Preſs-Maſters: *Hugett* and the others purſued them and required a ſight of their Warrant; but they ſhewed a piece of Paper, that was not a ſufficient warrant: Thereupon *Hugett* with the others drew their Swords, and the Preſs-Maſters theirs, and ſo there was a Combat, and thoſe who endeavoured to Reſcue the preſſed Man killed one of the pretended Preſs-Maſters. This was but Manſlaughter, for when the Liberty of one Subject is invaded, it affects all the reſt: It is a provocation to all People, as being of ill example and pernicious Conſequence. All the judges of the King's Bench, *viz. Keiling*, *Twiſden*, *Wyndham* and *Moreton* were of opinion, that it was Murder, becauſe he medled in matter in which he was not concerned: But the other eight Judges of the other Courts conceived it only Manſlaughter, to which the Judges of the King's Bench did conform, and gave judgment accordingly.

1 Hawk. 125, 129.—1 H. P. C. 465—Foſt. 154, 314.

This Opinion is contended againſt by Foſter 315 to 318, who concurs with Keiling and the three other Judges.

4. Fourthly, When a Man is taken in Adultery * with another Man's Wife, if the Huſband ſhall Stab the Adulterer, or knock out his Brains, This is bare Manſlaughter: for Jealouſy is the Rage of a Man, and Adultery is the higheſt invaſion of property, 1 *Vent.* 158. *Raymond* 213. *Manning's Caſe.* †

1 Hawk. 125.

If a Thief comes to Rob another, it is lawful to Kill him. And if a Man comes to Rob a Man's Poſterity and his Family, yet to Kill him is Manſlaughter. So is the law though it may ſeem hard, that the killing in the one Caſe ſhould not be as juſtifiable as the other. 20 *Leviticus*, 10 *Ver. If one commiteth Adultery with his Neighbour's Wife, even he the Adulterer and the Adul-*

2 Keb. 829. 2 Brown. 151.

* Although this is the higheſt poſſible invaſion of Property, a Man is not juſtifiable in killing another, whom he taketh in Adultery with his Wife; for it ſavours more of ſudden Revenge, than of Self-preſervation; but this Law hath been executed with great Benignity. 1 Hawk. in *Notes* to p. 110, *N. Ed.*—If the Huſband, however, detect the Raviſher in the Attempt, the Wife calling for Aſſiſtance, it is excuſable, *ſe defendendo.* 1 Hale. 486. 4 Black. Com. 181.

† In ſome books called Maddag's Caſe.

teresſ ſhall be put to death. So that a Man cannot receive a higher Provocation. But this Caſe bears no proportion with thoſe Caſes that have been adjudged to be only Manſlaughter, and therefore the Court being ſo adviſed doth determine that *Mawgridge* is Guilty of Murder. More might be ſaid upon this occaſion; yet this may at preſent ſuffice to ſet the Matter now in queſtion in its true Light, to ſhew how neceſſary it is to apply the Law to exterminate ſuch noxious Creatures. Upon this Condition the Court did direct that Proceſs ſhould be iſſued againſt *Mawgridge*, and ſo to proceed to Outlawry if he cannot be retaken in the mean time.

2 Hale 305 it is ſaid contrary to this determination, and thoſe of Mackally, 9 Co. Rep. 70. and Oneby's Caſe 9 St. T. 14. 2 Stra. 766. 2 L. Raym. 1485, 1 Barnard. 17—that he had rarely known any ſpecial verdict where the Queſtion was Murder or Manſlaughter, Judgment to be given for Murder, but commonly for Manſlaughter, *ſe defendendo.*

FINIS.

A

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